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NO. 277

IN THE

Supreme Court of the United States

October Term, 1961

G. & H. TOWING COMPANY, *Petitioner*

VERSUS

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP., *Respondents*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

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G. & H. Towing Company, respondent, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the interlocutory decree of the United States District Court for the Southern District of Texas in favor of the libellants Edwin E. Johansson, Kansas City Bridge Co., Merritt-Chapman & Scott Corp., and Pelican Island Development Corp, and remanding the cause for proof of damages.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 287 F. 2d 852 and appears *infra Appendix*, p. 33, *et seq.* The opinion is reported also at 1961 A.M.C. 703, but inaccurately in its original version, which was later corrected by order of the Court of March 27, 1961. The unreported opinion of the United States District Court, its Findings of Fact and Conclusions of Law, is printed *infra* Appendix, p. 39, *et seq.*, and at R. 874-887.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 15, 1961, and copy thereof is printed *infra* Appendix, p. 51. Thereafter petitioner presented to the Court of Appeals petition for rehearing, which was denied without further opinion on May 3, 1961.

Jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C., Sec. 1254 (1).

THE QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions:

I.

Whether the "pilotage clause" generally agreed upon between ships and their towing tugs in American harbor movements is lawful, particularly under these circumstances:

An ocean-going vessel with her master in command upon her bridge and with a full crew at their stations but without motive power, was being shifted by tugs within the confines of Galveston harbor. A licensed pilot, but an

employee of the company which was the charterer and operator of the tugs, was on the bridge as "dead-ship" pilot. On the advice of this pilot, the master ordered the ship's crew to drop the vessel's anchor, clearly an act of pilotage or vessel management and not of towage. The anchor struck a submerged pipe line. The tugs were in no way involved and were absolved from any liability.

The contract between the vessel's operator and the tug owner contained no words attempting to relieve the tugs or those connected with them for responsibility for negligent *towage*, but it did provide that any pilot upon a towed vessel was the servant of the vessel, and that neither the tugs nor their owners or agents or charterers would be liable for any acts of the pilot.

Did your Honors hold in *Bisso v. Inland Waterways Corporation*, 1955, 349 U. S. 85, that such a *pilotage* clause was invalid, as the Courts below have held, or is such a *pilotage* clause valid particularly where the negligence claimed is an act of *pilotage*, as your Honors have held in *Sun Oil Company v. Dalzell Towing Co.*, 287 U. S. 291, and in *United States v. Chris Nielson*, 349 U. S. 129, decided on the same day as *Bisso*, and as has also since been held in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209, and in all other decisions where a *pilotage* clause similar to the one in the contract here was at issue?

II.

The operators of an ocean-going vessel desire to shift her from one harbor berth to another. Although her full crew is aboard, the vessel has no motive power, her engines undergoing routine repairs. The operators have a contract

for tugs with one towing company, but another company actually operates the tugs which on request are sent to shift the vessel. By the contract the first towing company also offers to provide a pilot for such a shift, but it has no pilot in its employ and the tug operating company sends to act as pilot a regular salaried employee, its port captain, who is licensed by the United States Government to pilot vessels in these waters. The pilotage fee charged the vessel is paid to the contracting towing company, which pays part thereof to the tug operating company, which in turn pays part to the pilot.

With the pilot on the bridge during the shift are the vessel's master and third officer, and when told by the pilot it was time to do so, the master has the crew drop anchor. A pipe line is damaged by the anchor. The towing tugs are held in no way to blame. The contracting towing company, as owner of one of these tugs, is held not liable.

Is the tugboat operating company whose regular employee he is responsible as his employer for any negligence of the pilot in the dropping of the anchor, as the Court below holds; or is the pilot an independent contractor for whose acts such company is not responsible while he acts as pilot, in accordance with the holding of *Guy v. Donald*, 203 U.S. 399, and the holding of the Court below in *Dampskibsselskabet Atalanta A/S v. United States*, 5 Cir., 31 F. 2d 961, 1929 A.M.C. 855, and a borrowed servant of the ship or contracting towing company, in accordance with the rule of *Sun Oil Compapny v. Dalzell Towing Co.*, 287 U.S. 291, and *Standard Oil Co. v. Anderson*, 212 U.S. 215?

STATEMENT

This is a suit for damages to one of the two submerged pipe lines caused by its being struck by an anchor dropped

from a vessel being turned to enter a slip of the Port of Galveston, Texas. The slip was known as Slip "A."

The suit was in admiralty, and jurisdiction in the District Court for the Southern District of Texas lay under the Act of June 25, 1948, c. 646, 62 Stat. 931, Title 28, U. S. Code, Sec. 1333(1), amended Act of May 24, 1949, c. 139, Sec. 79, 63 Stat. 101, and Act of June 19, 1948, c. 526, 62 Stat. 496, Title 46, U. S. Code, Sec. 740.

Suit for damages in excess of $280,000 was brought by libellants as those at interest upon the pipe line against the M/V HAR CANAAN, from which the anchor was dropped, and her operator, and against the assisting tugs and their owning and operating companies, and by later amendment against the pilot of the M/V HAR CANAAN, petitioner Emmett Gray. Cross-pleadings were filed.

The evidence was largely without dispute, and with the exception of the facts surrounding the issuance of the order to drop the anchor, is with reasonable accuracy though it is respectfully submitted too briefly summarized by the District Court in its Findings of Fact, printed below at Appendix, p. 40.

Briefly, these are the controlling facts:

Pursuant to a permit issued by the United States Corps of Engineers, on January 27 and 28, 1958, libellants laid two pipe lines in a dredged trench on the bottom of Galveston harbor. On the Galveston Island end, the lines came out of the water about eighteen feet from the eastern side of Slip "A." From this point at the entrance to Slip "A" the pipe lines ran almost at a right angle to the center line of the channel directly across Galveston harbor to a point opposite Slip "A" on Pelican Island.

The last of three Notices to Mariners relative to the pipe lines was issued on January 16, 1958, and it notified

navigation interests of the location of the pipe lines, stating that the lines would run between Pier 41 (which is immediately adjacent to and to the east of Slip "A") and Pelican Island, and that "the location of the pipe lines is marked by warning signs on Pier 41 and on Pelican Island."

Instead of the location being so marked, the sign on Pier 41 was in fact placed at its nearest point to them some thirty-one feet east of the end of the pipe lines, and the sign on the Pelican Island side across the harbor was placed on a platform in the water east some one hundred fifteen feet from the pipe lines.

The two pipe lines were laid on January 27 and 28, and at no time between the time of their laying and the time of the casualty on March 21 were the pipe lines ever found to be farther apart than ten feet and actually were crossed and had to be pulled apart on March 3, R. 596, 599, and were pulled farther apart also on March 16 near their Galveston Island end when found there to be only one and one-half feet apart. R. 601-603.

The anchor struck the westernmost of the two pipe lines. Since there was no evidence that the other line was touched by the anchor, and since this line as stated lay no more and probably less than ten feet from the one struck by the anchor, it is manifest that had the pipe lines lain between the warning signs neither would not have been struck.

On the morning of March 21, the M/V HAR CANAAN was performing routine maintenance work upon her engines and had no motive or rudder power, but in order that her loading could continue it was desired to shift her from the berth where she then lay about two miles through Galveston harbor waters to another berth in Slip "A." Her agent notified the tug company, that the vessel was to be shifted "dead-ship," by the course of dealing it being un-

derstood that she had no motive power and that tugs and a pilot were to be sent to her. Respondent Emmett Gray was sent to act as pilot along with three tugs for power.

When he went aboard the vessel Captain Gray explained to the master that it would be necessary to drop the ship's anchor to assist in turning the vessel when Slip "A" was reached, and the master approved this planned maneuver, giving orders to his crew to have the anchor ready.

The vessel was then moved by the tugs through the harbor to Slip "A." During the entire time of this shifting, the tugs were directed by the pilot Captain Gray, but the master was in command and had with him on the bridge was the third officer, her full crew was aboard the vessel, and the vessel's chief officer with the required number of seamen were manning their deck stations.

When the vessel was near Slip "A," the pilot told the master the anchor should be dropped. The master testified that he then checked the prominent signs warning of the pipe line crossing and only after making sure the anchor would drop well clear of any lines did he permit the ship's third officer to transmit the order to the chief officer and crew forward, who dropped the anchor. R. 681-683.

Captain Gray testified that he knew generally that pipe lines were being laid across the harbor between Pier 41 and Pelican Island but had not actually sighted them nor while they were being worked on had before this time piloted a ship in their vicinity nor had read the Notices to Mariners dealing with them. In giving the order or advice to the master to drop the anchor he relied on the warning signs as to the location of the lines. (Captain Gray's recollection was that the master gave the order to drop the anchor before Gray pointed out the signs to him; the master testified positively, however, that he asked Gray about the signs and himself checked them to be sure

the anchor would fall clear before giving the order to his crew to drop the anchor. R. 681-683.)

There was no evidence that the three tugs furnishing the motive power for the movement of the vessel were in any way at fault.

For sometime prior to the day of the casualty, those tugs which assisted in the movement of ocean-going vessels within the harbors of Galveston and some other Texas ports, i.e., which were used in the harbor towing of deep-sea vessels such as the M/V HAR CANAAN, were owned by three separate towing companies. One of these was Bay-Houston Towing Company, whom the operator of the M/V HAR CANAAN by signed contract engaged to provide all the tugboat power it required.

These three owning companies made all agreements with ship operators requesting the services of towboats, but did not actually operate the tugs. The tugs were chartered bareboat to an operating company, petitioner G. & H. Towing Company, that manned and operated them, so as regardless of ownership to utilize the tugs most efficiently in assisting vessels needing tugboat power.

Only at Galveston, where the state-licensed bar pilots before the time of this casualty did not offer pilotage services for such ships, did the three towing companies offer to furnish pilotage for ships without motive power. But these owning companies did not themselves employ any pilot to perform such services; they requested petitioner G. & H. Towing Company to furnish a pilot to perform their contracts.

To act as such pilot for a ship without motive power, G. & H. Towing Company designated its port captain, respondent Emmett Gray. Captain Gray was licensed by the United States Government to act as pilot for the waters of Galveston harbor, but he held no license as a bar pilot from

the State of Texas and was not a member of the Galveston Pilots Association.

While, as stated, the operation of the tugs was done only by G. & H. Towing Company, their charterer, the three owning companies maintained separate soliciting offices and were actively competitive with each other, for they and not G. & H. Towing Company made the contracts with steamship operators for tug services and billed for the services, and only the company having such contract received thirty-five per cent of the amounts paid. Even if it owned the tug which performed the service unless it had the contract with the steamship operator the owning company received none of the revenue derived from that particular towing job. In each instance the charterer, petitioner G. & H. Towing Company, received sixty-five per cent of the revenues earned, being paid by the contracting owning company and not by the steamship operator. R. 784-785.

Where in Galveston harbor pilotage services were furnished a ship without motive power, the contracting towing company kept thirty-five per cent of the charge made the ship, paid G. & H. Towing Company sixty-five per cent, and out of its sixty-five per cent G. & H. Towing Company paid Captain Gray $20.00. R. 787.

There is not an iota of evidence that to secure tug services in Galveston or elsewhere steamship operators were in any way required to sign any agreement with any of the towing companies as a condition of receiving the services of tugs, but if a steamship operator did sign an agreement by whch it agreed to obtain all of the tug services it needed only from the one owning company with which it contracted, it obtained the tug services at a ten per cent discount off the tariff rates. Appendix IV, p. 52.

The charterer of the M/V HAR CANAAN, Maritime Overseas Corporation, had before the casualty signed such an exclusive contract with Bay-Houston Towing Company, and it received the ten per cent discount for the tug hire and the pilotage furnished the vessel on the day in question, paying the sums due to Bay-Houston Towing Company. R. 727-729.

There were no material differences between the contracts offered steamship operators. Each contained a provision allowing the use of tugs other than those owned by the contracting towing company like this:

> "Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs."

And each contained a "pilotage clause," as follows:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and nine of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

Each contract also contained as part of the tariff for Galveston-Texas City the provision:

> "Pilotage-Shifting Vessels Without Own Power. . . $60.00."

Nowhere in the tariffs, nor in the contract signed by Maritime Overseas Corporation with Bay-Houston Towing Company covering the movement of the M/V HAR CANAAN on the day of the casualty, is there any language which could conceivably be read to mean that the towing companies contracted to move vessels from one location to another. The company offered and agreed *only* to provide *tugboat power*, and the rates charged were only *for each tug furnished*, though these rates of course varied with the distance the tug assisted the vessel. Appendix V, p. 55.

The Trial Court found that Captain Gray was negligent in giving the order to drop the anchor, which fell on the pipe line, the "presence" of which he should have known from other sources and from the prominent warning signs but as to the location of which he was not misled by the position of the warning signs. The master of the M/V HAR CANAAN was found not at fault because "the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master." Gray was held liable personally for his negligence and found not to be a loaned servant to the vessel, and G. & H. Towing Company liable because he was its employe acting in the scope of his employment, and the M/V HAR CANAAN liable *in rem* for the negligence of Gray "as her pilot." The vessel was allowed indemnity from both Gray and petitioner G. & H. Towing Company.

The towing tugs and their owners were found not liable. The exculpatory provisions of the pilotage clause of the contract with the vessel's operator were held to be void, reliance being placed upon *Bisso v. Inland Waterways Corporation*, 349 U. S. 85, on the ground that the monopolistic situation in Galveston harbor gave no freedom of choice to vessels in the type of towing contract offered and to secure tugs vessels had to agree to such exculpatory provisions. *Sun Oil Company v. Dalzell Towing Co., Inc.*, 287 U. S. 291, was distinguished.

The Court of Appeals affirmed, petitioner Gray's negligence being found to be a failure to use due care "to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines he dropped the anchor on them." No mention is made of the master of the M/V HAR CANAAN.

After thus imposing upon petitioner Gray an absolute duty to know the exact location of the pipe lines, and holding petitioner responsible as his employer, the Court below agreed the pilotage clause was invalid under the *Bisso* decision and distinguished the case of *Sun Oil Company v. Dalzell Towing Company* as one dealing "with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots" and stated Gray was not such a pilot, the case really being merely one where G. & H. Towing Company furnished a towing service to a dead ship and its port captain conducted it. The liabilities of the M/V HAR CANAAN and of Maritime Overseas Corporation were then affirmed *under the law governing pilotage*. (The Court of Appeals by its order of March 27, 1961, corrected its statement that Maritime Overseas Corporation had been found liable *in personam*.)

REASONS FOR GRANTING THE WRIT

Your Honors should grant writ of certiorari in this cause for the following reasons:

(1) To correct the manifest error of the Court of Appeals in refusing to follow the settled law that an exculpatory pilotage clause such as that in the contract here is valid and not contrary to public policy and unenforceable, there being not a single other American decision so holding, and your Honors having expressly upheld as valid such a clause in *Sun Oil Company v. Dalzell Towing Co.*, 287 U.S.291, and having as recently as 1955 affirmed the validity of such a clause in *United States v. Chris Nielson*, 349 U.S 129, decided the same day as *Bisso v. Inland Waterways Corporation*, 349 U.S. 85. We respectfully submit that the Court is in plain error in holding applicable to this case of *pilotage* the decision in *Bisso v. Inland Waterways Corporation*, which only held invalid a broad *towage* freedom-from-liability clause, and in declaring the *Sun Oil Company v. Dalzell Towing Co.*, case inapplicable as one of "publicly licensed involuntary or compulsory pilots," that *Dalzell* case being clearly one where no compulsory pilot was at all involved and being instead one where the captain of one of the assisting tugs directed the ship maneuver. We further earnestly submit the decision below is in direct conflict with the recent decisions in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209, and with all other decisions where the pilotage clause has been directly at issue. Since a similar pilotage exculpatory clause is, as far as petitioner can tell from the decisions, at use in every American port, this decision if left unreversed would tend to upset

an important segment of American maritime law and contracts under which most ocean-going vessels are moved in American harbors.

(2) To correct the error of the Court in holding that where an employee of a towing company is aboard a fully manned vessel under the command of her master acting as the vessel's pilot and held by the Court to a standard of care even greater than that lawfully required of pilots, and voluntarily engaged by the vessel's operator, his regular employer is responsible for his negligent pilotage acts, the holding of the Court of Appeals being directly contrary to the maritime law that pilots are independent contractors subject only to the control of the vessel's master, as held in many cases, including *Guy v. Donald*, 203 U.S. 399, *Sherlock v. Alling*, 93 U.S. 99, and two cases decided by the Court below, namely *Charente Steamship Co. v. United States*, 5 Cir., 12 F. 2d 412, and *Dampskibsselskabet Atalanta v. United States*, 5 Cir., 31 F. 2d 961.

(3) To correct the error of the Court below in holding that a pilot, normally employed in another capacity, furnished to a contractor so that it can perform its contract to provide a pilot for a fully manned vessel in command of its master though without motive power, remains in the employment of his regular employer during all the time he is aboard the vessel acting as pilot and does not become the servant of the vessel or the contractor, so that his general employer is liable for his negligent pilotage acts, the holding of the Court below being directly contrary to the decisions of *Sun Oil Company v. Dalzell Towing Co.*, 287 U.S. 291, and *Standard Oil Co. v. Anderson*, 212 U.S. 215.

ARGUMENT

I.

With all respect, petitioner respectfully submits that the Court below has confused the decisions which hold invalid clauses exempting companies and tugs from liability for *negligent towage* with the decisions which uphold the validity of exemptions from liability for acts of *pilotage*. We submit that this is abundantly clear from a careful reading of *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, striking down towage exemptions and carefully affirming the correctness of decision of *Sun Oil Company v. Dalzell Towing Co.*, 287 U.S. 291, where the exemption is a *pilotage* exemption as here, and a careful reading of *United States v. Chris Neilson*, 349 U.S. 129, which also affirms the validity of *pilotage* exemptions and states *Bisso* voids only *towage* exemptions.

The consequences of this mis-reading of those decisions are that petitioner, while not even a party to the contract under the terms of which the tugs and the pilot were furnished the vessel, and engaged only in the business of operating tugboats, is denied the protection of the pilotage exemption expressly set forth in the contract and to which the Court of Appeals acknowledges it would otherwise be entitled since the Court holds "in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, its employee, indeed its port captain." Petitioner is therefore held liable for damages stated to be in excess of $280,000.00, and instead of being *allowed* indemnity from the vessel operator as it would be had the case been correctly decided in accordance with numerous decisions, particularly those decided by the Court

of Appeals for the Second Circuit, is instead *required to indemnify* the vessel!

Petitioner respectfully submits that this decision is contrary to the settled American maritime law governing in circumstances such as these.

The Contract Afforded Petitioner Exemption for Pilotage Faults, Though Not for Towage Faults

The contract between Bay-Houston Towing Company and Maritime Overseas Corporation, operator of the M/V HAR CANAAN, is reproduced at Appendix V, p. 55, below.

It will be noted that petitioner G. & H. Towing Company is not a party to this contract and not named therein, though the pilotage clause clearly exempts petitioner G. & H. Towing Company because it exculpates the *charterers* of the tugs furnished the vessel and the contract.

Nowhere in the contract is any language exempting the tugs or those at interest upon them for any faults of *towage* or *tug operation.*

On the other hand, the contract in several places expressly says that the company only agrees to furnish *tug power*, and expressly provides against liability for the acts of "any pilot" on board an assisted vessel. This clause reads:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel,

> or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

It will have been noted that the Court of Appeals has by implication held that had this clause been valid, it would have protected petitioner G. & H. Towing Company.

There can be no doubt that petitioner comes within the language of the clause even though not a party to the contract. The contract was between Bay-Houston Towing Company, a tugboat owner and a respondent herein, and Maritime Overseas Corporation, the charterer and claimant and operator of the M/V HAR CANAAN, a respondent herein. The contract expressly permitted the towing company to furnish tugs other than its own, and it called upon petitioner G. & H. Towing Company, charterer of the tugs furnished the M/V HAR CANAAN to tow it, to supply the tugs.

By the contract Bay-Houston Towing Company also agreed in Galveston harbor to furnish a pilot for a ship which was to be shifted without its own motive power. There is nothing in the contract which required Bay-Houston Towing Company to furnish any particular pilot, and it secured the pilot for the vessel from petitioner, the tugs' charterer. The pilotage clause is not restrictive, and it expressly exempts the tug *charterer*, petitioner, from any liability for the acts of *any pilot*. It is therefore clearly established here that by the express terms of the pilotage clause of the contract petitioner is exempted from liability

for the acts of the pilot Gray while aboard the vessel performing pilotage duties.

Dropping the Anchor Was an Act of Pilotage

It is certainly clear that dropping the ship's anchor cannot rightfully be deemed an act of towage. It was clearly an act in the navigation and management of the vessel, accomplished by the ship's crew on the command of the ship's master and at the suggestion, advice, or order of the ship's pilot on the bridge.

The towing tugs obviously had nothing to do with the dropping of the anchor, as is clearly demonstrated by the fact that the District Court dismissed the libel as to them and their owners and absolved them from liability.

Decided cases likewise hold that the dropping of a ship's anchor is an act in the management of a vessel. Please see *The Etona,* S.D. N.Y., 64 F. 880, affirmed 2 Cir., 71 F. 895, and *Luria Bros. & Co., Inc. v. Eastern Transp. Co.,* 2 Cir., 1937, 89 F. 2d 900, both Harter Act cases.

And finally, petitioner Gray has been held by both Courts below to the high standard of care required of pilots, he was sent aboard the vessel as pilot and acted under his government license of pilot, and the District Court held him as pilot and held the vessel *in rem* "for the negligence of Captain Gray as pilot." The contract of course called him a pilot.

Pilotage Exemption Clauses Are Valid

Petitioner believes that there have been no previously decided cases in which the applicability of a like pilotage clause has been directly at issue that have held such a clause

invalid. The decided cases have so uniformly upheld the validity of such clauses that Mr. Justice Frankfurter in his dissenting opinion in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, at 98, *et seq.*, was able to assert on a review of the authorities that *all* exemption clauses in towing contracts had theretofore been found to be valid.

The decision in *Bisso v. Inland Waterways Corporation*, at page 92, clearly holds pilotage exculpatory clauses valid, citing *Sun Oil Company v. Dalzell Towing Co.*, in the following language:

> "It is contended that the towage contract rule we have accepted was rejected by this Court in Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311. We disagree. Unlike the Steamer Syracuse, The Wash Gray and the instant case, Sun Oil did not involve a contract designed to relieve a towboat owner from liability for negligent towage. The contractual clause there involved related only to pilotage. The clause provided that a tug captain who piloted a vessel propelled on its own power should be considered the servant of that vessel and that the tug owners should not be liable for his negligent pilotage. Sun Oil construed this contract as relieving the tugboat owners from all liability for negligence of the tug captain while piloting Sun Oil's vessel and held the contract valid as thus construed. But both the Court of Appeals and this Court recognized that holding the pilotage contract valid did not conflict with The Steamer Syracuse or The Wash Gray. Indeed, this Court expressly stated that the Sun Oil decree was 'not in conflict with the decisions' in The Steamer Syracuse and The Wash Gray. It is of course possible that the Court found an absence of conflict in the cases because of a different construction given the dif-

ferent contracts involved. We doubt this, but however this may be there are more basic differences upon which we prefer to rest this Court's statement that Sun Oil did not conflict with the two prior cases.

"There are distinctions between a pilotage and a towage exemption clause which make it entirely reasonable to hold one valid and the other invalid. A pilotage clause exempts for the negligence of pilots only; a towage clause exempts from all negligence of all towage employees. Pilots hold a unique position in the maritime world and have been regulated extensively both by the States and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person can tell them how to perform their pilotage duties. When the law does not prescribe their duties, pilots are usually free to act on their own best judgment while engaged in piloting a vessel. Because of these differences between pilots and towage employees generally, contracts stipulating against a pilot's negligence cannot be likened to contracts stipulating against towers' negligence. It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company's vessel on that vessel's own power. That was the Sun Oil case. It is quite a different thing, however to permit a towing company to exempt itself by contract from all liability for its own employees' negligent towage of a vessel. Thus, holding the pilotage contract valid in the Sun Oil case in no way conflicts with the rule against permitting towers by contract

wholly to escape liability for their own negligent towing."

Petitioner respectfully submits that your Honors affirmed this validity on the same day in the following portion of your decision in *United States v. Chris Neilson*, 349 U.S. 129, 130:

> " . . . We granted certiorari to consider the meaning and validity of the pilotage clause, 348 U.S. 811, 75 S. Ct. 59, and at the same time granted certiorari in two other cases, today decided. which involve validity of contracts exempting towers from liability for negligent towage. Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S. Ct. 629; Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 75 S. Ct. 649.
>
> "Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311, involved the meaning and validity of a pilotage contract substantially the same as the one here. One of Dalzell's tug captains negligently piloted Sun Oil's vessel causing the boat to ground and suffer damages. Sun Oil sued Dalzell. The contract exempting Dalzell from liability for pilotage was pleaded as a defense. This Court held that the tug company could validly contract against being 'liable for any damage' caused by the negligence of one of its captains in piloting Sun Oil's vessel and construed the contract there as having that effect. . . ."

That petitioner's reading of these decisions is correct is further established, it is respectfully submitted, by the decisions in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209.

Petitioner therefore respectfully submits that the Court below is clearly in error in its interpretation of *Bisso v. Inland Waterways Corporation*, *Sun Oil Company v. Dalzell Towing Co.*, and *United States v. Chris Neilson*, and that its decision is clearly in conflict with the two last cited cases decided by the Courts of Appeal for the Ninth and Second Circuits.

No Circumstances Here Justify Denying Validity to the Pilotage Clause

The trial Court found that public policy required the pilotage clause to be denied validity because under the monopolistic situation prevailing in the port of Galveston a vessel had no freedom of choice in the type of towing contract offered and must accept a contract with the exculpatory provisions to secure tug assistance.

While it is not admitted that where as here three separate owning companies charter their tugs to an operating company to secure efficient service there is any monopolistic situation, nevertheless the Court is in plain error in stating that a vessel had to agree to a contract with the exculpatory clause to secure tug assistance.

There is absolutely no evidence that vessels were under any requirement to sign the contract, as the operator of the M/V HAR CANAAN did here, in order to obtain tug assistance. As an examination of the contract shows, the inducement to sign it and agree to the contract is the ten per cent discount afforded those signing the contract. This was so testified to. R. 803. And please see Appendix IV, p. 52, and particularly the closing sentence of the offer, "All charges are net, *except when services are performed under contract*, then a discount of 10% is to apply on all tariff rates."

This clearly shows ships could secure tugs without having to sign the contract, and there is as stated no evidence to the contrary.

Further, none of the cases, which uniformly uphold the validity of pilotage clause exemptions, and which are from the great breadth of decisions found in harbor towing contracts in similar terms in practically all American ports, have ever intimated that because towing services are not furnished by numerous companies the pilotage exemption is invalid. And in the exemption clause employed in the greatest American port, New York, the exemption is accorded from acts of the captains off the tugs, a much broader exemption than the one here of a licensed pilot, even though an employee of the towing company actually furnishing the tugs.

Nor does reason support this view why such a clause should be held invalid. Pilots are licensed by governmental authority and exercise independent judgment and are not subject to supervision and control, except on occasion by the master of the vessel. And why should an assisting tug be obligated to assume the ship's responsibility for the acts of the pilot? The ship is a common carrier, the towing tug not. If the towing tug diligently performs its towing duties, why should it be burdened with an added responsibility for the pilot?

The Court of Appeals did not base its decision holding the clause invalid upon the ground stated by the District Court, but instead preferred to affirm on the ground that petitioner was in fact not a pilot but simply one in charge of a dead-ship towing operation.

(Of course, its characterization of the *Dalzell* case as one of true pilotage by publicly licensed compulsory or in-

voluntary pilots is manifest error; in that case the piloting was done by a captain from one of the assisting tugs, and the exculpatory clause was one stating a captain off a tug became an employee of the vessel being assisted.)

Since the exculpatory clause generally used in New York, and held valid in *Sun Oil Company v. Dalzell Towing Co.*, deals with a tug captain and not a pilot, as do many such clauses held valid, the reason given by the Court of Appeals is without support in the adjudicated cases.

Its description of the facts here is in error also, it is submitted with all respect: the *contract*, which cannot rightfully be ignored as the Court apparently does, nowhere provides that a complete towing service was to be provided the ship. The contract provided only for tug power, which was furnished, and entirely independently had a clause agreeing in Galveston harbor to provide a pilot on request where the vessel was to be shifted without motive power.

And of course, finally, the acts of negligence charged in this case were acts of *pilotage*, not towage, and the *Bisso* case reference is in error also.

Petitioner respectfully submits, therefore, that the Court of Appeals is in clear error in denying the validity of the pilotage clause under the circumstances of this case, and that he is by such clause in accordance with the settled law enforced in *Moran Towing & Transp. Co. v. Nav. Lib. Triestina*, 2 Cir., 1937, 92 F. 2d 37, 1937 A.M.C. 981, cert. den. 302 U.S. 744, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209. and *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, entitled to be indemnified by the M/V HAR CANAAN and its operator Maritime Overseas

Corporation from any liability to respondents the pipe line owners.

II.

The M/V HAR CANAAN here, though without motive power, was fully manned, and throughout the maneuvering of the vessel her master and third officer were upon the bridge along with the pilot and her deck crew were at their proper stations.

Captain Gray undoubtedly was the vessel's pilot, though a pilot voluntarily engaged by the vessel's operator. The Trial Court in conformity with the evidence found him to be a pilot, held him liable for what are clearly acts of pilotage and not towage in accordance with standards of care imposed on pilots, and held the vessel liable *in rem* for his acts "as pilot." Of course such fact findings are under the rule of *McAllister v. United States*, 348 U.S. 19, binding upon the Court of Appeals, but nevertheless that Court has at least inferentially accepted the finding that Captain Gray was a pilot by holding him to a standard of care even greater than that imposed upon pilots.

The contract between Bay-Houston Towing Company and respondent Maritime Overseas Corporation denominated him a pilot, and the master of the vessel considered Captain Gray to be the vessel's pilot.

Under such circumstances there can be no doubt of the error of the Court of Appeals in holding petitioner G. & H. Towing Company liable for Captain Gray's acts simply because it was his normal or general employer.

It has long been settled maritime law that a pilot aboard a navigated and manned vessel is an independent contractor,

himself responsible for his acts, *Guy v. Donald*, 203 U.S. 399, even though the vessel and its operators are as his employer also responsible. *Sherlock v. Alling*, 93 U.S. 99, and please see the statements to that effect also in *Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406. The Court of Appeals below has itself expressed the rule clearly in *Dampskibsselskabet Atalanta v. United States*, 5 Cir, 31 F. 2d 961, 962, in the following language:

> "The fundamental principle underlying the exemption of pilots' associations from liability for negligence in performing their duties as pilots is that the association exercises no control over the manner in which those duties are to be performed, and therefore a pilot cannot be said to be an agent of the association in that respect."

While the pilot is an independent contractor he nevertheless is subject to the master's control and does not relieve the master of his command of the vessel. This is of course settled maritime law, as held in *The China*, 7 Wall. 53, *The Oregon*, 158 U.S. 186, and many other cases, including the decision of the Court below in *Charente Steamship Co. v. United States*, 5 Cir., 12 F. 2d 412, at p. 413.

Can there be any doubt that if in the course of the movement on this occasion the pilot had given orders imperiling the vessel itself or other vessels using the harbor it would have been the duty of the master upon the bridge with Captain Gray to have countermanded the order or relieve him from acting as pilot?

And how could any control over Captain Gray have been exercised by petitioner G. & H. Towing Company?

Peitioner respectfully submits that holding it as the general employer of the pilot for his acts while serving aboard the vessel as pilot is clearly wrong and directly contrary to the settled law and such holding should be reversed.

III.

Peitioner G. & H. Towing Company respectfully submits further the Court below was clearly in error likewise in holding it as the employer, just as the trial Court was in clear error in so holding petitioner and in finding that while acting aboard the vessel as its pilot Captain Gray was not a borrowed or loaned servant.

It is of course true that while Captain Gray was in the regular employment of G. & H. Towing Company neither he nor G. & H. Towing Company were parties to the contract between Bay-Houston Towing Company and respondent Maritime Overseas Corporation, under which the vessel requested his services and under the terms of which he went aboard the vessel.

The contract of course did not obligate Bay-Houston Towing Company to obtain a pilot from petitioner: it could have furnished any person qualified to act as pilot, its own employee or any other person. Without a doubt, in securing the pilot from petitioner to fulfill its contractual obligation, Bay-Houston Towing Company made the person furnished to that extent its own agent or servant so far as this could lawfully be done. Of course it is clear Bay-Houston Towing Company was paid for the pilot's services in accordance with the contract at the contract rate, and it retained a portion of the amounts paid.

How can it be found if the evidence is given its lawful effect that Bay-Houston Towing Company was not there-

fore the special employer of the pilot and that while aboard the vessel Captain Gray was certainly no longer the employee of G. & H. Towing Company?

It is of course noteworthy that Bay-Houston Towing Company was dismissed from this cause and held not liable, along with its tug and the other tugs and their owners, and while this was done because there was no proof at all the towing services were negligently performed, it is submitted such dismissal effectively results in finding that actually, as is of course the law, pilot Gray was the servant of the vessel and its operators while aboard it as pilot.

Certainly the pilot Gray while aboard the vessel and acting as pilot was the loaned employee of the vessel and its operator Maritime Overseas Corporation, if regard is paid to the settled law. This is certainly the holding of your Honors in *Sun Oil Company v. Dalzell Towing Co.*, 287 U.S. 291, where it is said:

> "Respondent's responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage. The provision that its tug captains while upon the assisted ship would be the servants of her owner is an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former. Denton v. Yazoo & M.V.R. Co., 284 U.S. 305, 308, 52 S. Ct. 141, 76 L. Ed. 310. It would be unconscionable for petitioner upon occurrence of a mishap to repudiate the agreement upon which it obtained the service."

As has been pointed out above, certainly no one other than the master of the vessel had any control over Captain Gray while he was upon this manned vessel performing his duty as pilot. Within the tests laid down by your Honors in *Standard Oil Co. v. Anderson*, 212 U.S. 215, and those in *Fries v. United States*, W.D. Ky., 76 F. Supp. 396, affirmed 170 F. 2d 726, cert. den. 336 U.S. 954, and *Dougall v. Spokane, P. & S. Ry. Co.*, 9 Cir., 207 F. 2d 843, cert. den. 347 U.S. 904, certainly Captain Gray was the employee of the vessel and *not* of petitioner. As the rule is put in the *Dougall* case, at page 846:

> "The test is not for whose benefit the workman is performing services but who had the right to control him in the performance of his duties."

Furthermore, the holding of the Court of Appeals that this maneuver after all was simply a towing operation of petitioner's under the direction of its employee Captain Gray is clearly wrong.

This holding of course first of all ignores completely the contract and the contractual relationships here. The contract between Bay-Houston Towing Company and Maritime Overseas Corporation *did not* call for anything more than the furnishing of tugs and a pilot: it did not in any way call for Bay-Houston Towing Company to take charge of and to move the ship as an entire job.

Nor was of course petitioner a party to that contract, as has been pointed out.

Conclusively to the contrary of the Court's holding, it is respectfully submitted, is the fact that the vessel was *fully manned*, and the vessel and its movements were *in direct charge of the vessel's master*, who never either in law or in fact relinquished his command to Captain Gray.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that this petition for writ of certiorari be granted and that the judgment of the Court of Appeals be reversed and the petitioner freed from liability and indemnified from any liability by the vessel and its operator respondent Maritime Overseas Corporation, and petitioner be held not required to indemnify the claimant of the M/V HAR CANAAN.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that service of the within petition for writ of certiorari was made upon McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, attorneys for respondents, and Eastham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, attorneys for respondent Maritime Overseas Corporation, claimant of the M/V HAR CANAAN, by mailing copy of the same to them at their addresses shown, this day of July, A. D. 1961.

ROBERT EIKEL

APPENDIX I.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18619

EMMETT GRAY, G & H TOWING COMPANY and MARITIME OVERSEAS CORPORATION,
Appellants,

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(March 15, 1961.)

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

HUTCHESON, Circuit Judge: This appeal is from findings and a judgment in admiralty in favor of the libellants, in a suit brought by them as owners of pipe lines, for damages resulting from their negligent destruction in the course of shifting the M/V Har Canaan as a dead ship to a slip in Galveston Harbor.

A great deal of testimony was taken on the issue of fault, and the district judge made full findings in effect that the destruction of the pipe lines was due to the negligence of the respondent, Emmett Gray, port captain for G & H Towing Co., who was furnished by it as a pilot for the dead ship movement.

Based on these findings, the court adjudged: (1) Gray liable; (2) the Har Canaan liable in rem; (3) Maritime Overseas, owner of the Har Canaan, not liable in personam; and (4) G & H Towing Co., the employer and furnisher for the movement of Emmett Gray, its port captain liable in personam. He also denied and awarded indemnity as follows:

> "Thus, as to the liability over between the several respondents, the following conclusions are made.
>
> "6. G & H Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the Har Canaan, for any payment they may be required to make under the decree to be entered herein.
>
> "7. Maritime Overseas Corporation, as claimant of the Har Canaan, is entitled to indemnity from Captain Emmett Gray, individually, and from G & H Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G & H Towing Company to Maritime Overseas will be joint and several."

Gray, as the respondent held primarily liable, here insisting that the findings and conclusions, that he was negligent in handling the ship so as to cause injury to the pipe lines, are clearly erroneous, launches massive attacks upon the findings, that he was negligent, and urges upon

us that the cause of the injury to the pipe lines was negligence not on his part but on the part of the pipe line owners in not properly laying and maintaining the lines in place and in not clearly and properly marking their location.

The other appellants join him in this attack and argue mightily that the district judge has misconceived what actually occurred and that the findings of negligence are against the truth and right of the case.

The G & H Towing Company, in addition to its attack upon the negligence findings of the court, strongly attacks the court's conclusion, that the clause in its contract providing in effect that it would not be liable for the acts of pilots furnished by it would not avail it, as an erroneous conclusion of law, and urges that, because of that clause, Gray's negligence would not be imputed to it, and it could not, therefore, be held liable for it.

The Har Canaan and Maritime Overseas Corporation, its owner, argue vigorously that they were not responsible and cannot be held liable for the negligence of the pilot. Each of these argue that the conclusions on idemnity are wrong.

For the reasons hereafter stated, we are of the opinion: that the district judge was right throughout in his findings of fact and in his conclusions of law, that Gray was guilty of negligence in causing the anchor to be dropped upon the pipe line, and that, as a result of his negligence, he and the other respondents found liable are liable to the pipe line owners for the damage done them; and that the right of exoneration, action over, or indemnity is as he concluded it to be.

Taking up first the primary question of whether the findings of fact as to fault should be set aside, we think

it sufficient to briefly say that the matter of fault or negligence is a disputed issue, and that, on the record as a whole, there was ample evidence for the district judge to find, as he did: that Gray and, therefore, the Har Canaan and its owners, and the G & H Towing Company knew that the pipe lines were laid in the slip under permit; that the burden was heavily upon them to show, in defense of their act in dropping the anchor, that they had made proper inquiries as to just where they were laid; and that due care had been used in dropping the anchor to avoid striking and injuring them in the course of the ship's movement; that, in short, Gray and the other respondents could not shift liability for the affirmative acts causing injury to the pipe line as a result of dropping the anchor on the lines by complaining here that, as matter of law, the pipe line owners were at fault in not marking more precisely the position of the lines, or that the findings that they were not are clearly erroneous.

In declaring these views, we are not holding that the district judge could not have found the fault and responsibility as these contend he should have. We are holding, though, that it was entirely proper for the district judge to find, as he did, upon the whole facts, that the proximate cause of the injury sued for was the failure of Gray to use due care to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines, he dropped the anchor on them with damaging results.

With the highly important question of primary fault for the injury thus disposed of by our holding that the court's findings as to Gray's negligence are not clearly erroneous and must be approved, we turn to the other questions raised by the several appellants.

The first of these is the complaint of all the appellants, including Gray, that the district judge erred in refusing to give effect to the pilotage clause[1] in the towing contract, providing in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, its employee, indeed its port captain.

Of this, we think it sufficient to say that we agree with the district judge's conclusion that the libellants, strangers to the contract, cannot, of course, be held bound, or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that appellants are bound and precluded by the decision and holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, that such a clause is invalid. In addition, we think it clear that respondents' reliance on *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, will not at all do there, both because of the decision in the Bisso case, which, on full consideration, rejected the Dalzell case as authority for the position here taken, and because the Dalzell case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in the case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation

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[1] "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel, or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for (sic) any act, omission or order of said pilot."

who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the Bisso case, and the judgment denying effect to the invoked clause of the contract must be affirmed.

We are also of the opinion that there is no merit whatever in Gray's claim that he is protected from liability for his own fault by the terms of the contract, even if it were otherwise regarded as valid. Neither is there any merit in the claim of Maritime Overseas Corporation and Har Canaan, that they are not liable for Gray's acts because, under the law governing pilotage, they could not be held liable for the pilot's negligence. We find nothing in the cases cited by them, nothing in the cases generally, which supports this claim. Indeed, we think the cases have settled the law to the contrary, even in a case of true involuntary or compulsory pilotage. Cf. *Publicker Industries, Inc. v. Tug Boat "Neptune" Company et al*, 171 F(2) 48; *United States v. Chris Nielson*, 349 U.S. 129. We are, therefore, of the clear opinion that the court's findings of fact as to fault in the injury to the pipe lines cannot be set aside as clearly erroneous; that his conclusions, that the respondents held liable were in fact and in law responsible to the libelants, are correct and may not be set aside; and that all questions as to actions over for exoneration and/or indemnity were correctly decided, and the decree is in all things AFFIRMED.

APPENDIX II

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

This proceeding is brought in rem against the Israeli vessel HAR CANAAN, claimed by Maritime Overseas Corporation; in rem against the Tug J. R. GUYTON, owned by Bay-Houston Towing Company; in rem against the Tugs JUNO and ALBATROSS, owned by Suderman & Young Towing Company; and in personam against Bay-Houston Towing Company; Suderman & Young Towing Company, and G. & H. Towing Company, the charterer and operator of the three tugs named, and Emmett Gray, an individual, employed as Port Captain by G. & H. Towing Company. The Libellants are Pelican Island Development Corporation, the owner of the pipeline work which was damaged in this casualty; Merritt-Chapman & Scott Corporation, general construction contractor for the Pelican Corporation; Edwin E. Johansson, sub-contractor under Merritt-Chapman & Scott for construction of water and sewer pipelines between Galveston Island and Pelican Island; and Kansas City Bridge Company, sub-contractor under Johansson for the cross channel portion of this construction which was immediately involved. By impleading petition of cross-libel, Maritime Overseas Corporation asks indemnification from the Tugs J. R. GUYTON, JUNO, and ALBATROSS, and from all the named respondents, for any recovery libellants may obtain against the HAR CANAAN or her claimant, and by impleading petition or cross-libel, those same respondents jointly and severally ask indemnification from Maritime Overseas Corporation for any recovery libellants may obtain against them.

A trial having been had on the issues of liability alone, and having received and considered the evidence and the briefs and arguments of the proctors for the respective parties, these Fndings and Conclusions are made by me pursuant to Admiralty Rule 46½.

FINDINGS OF FACT

1. The channel between Galveston Island and Pelican Island is a part of the Galveston harbor. Slip A is immediately west of Pier 41 on the Galveston Island or southerly side of this channel. The width of the channel at this point is approximately 1400 feet, and the channel at this point is dredged to a depth of approximately 35 feet between the harbor lines, a distance of 1125 feet.

2. On April 12, 1956, a permit was issued to libellants through the office of the United States Corps of Engineers for the construction of water and sewer mains, each approximately 12 inches in diameter, to be laid in a trench across the Galveston channel, and at a depth not less than 50 feet below mean low water. By amendment of the permit on December 16, 1957, the center line for this crossing, at the southerly or Galveston Island end, was established at a point which the evidence shows to be approximately 18 feet eastward from the northeast corner of Slip A, and the line of bearing for the crossing from that point was N 10° 23′ 25″, or almost directly across the channel to a point opposite on Pelican Island.

3. Acting under this permit, as originally issued and so amended, Merritt-Chapman, as general contractor for the Pelican Corporation, contracted with Johansson for the construction of these pipelines, and Johansson in turn subcontracted to Kansas City Bridge Company that part of the work which involved laying the sub-aqueous lines. A

trench was dredged across the channel to the necessary depth of 51½ feet, which was approximately 16 feet deeper than the normal depth of the channel between the harbor lines. The dredged trench followed the center line of the crossing as established by the amended permit, and extended about 50 feet to either side of that centerline. This portion of the work was completed prior to November 27, 1957, and soundings of the trench were made by the United States Corps of Engineers on that date. Late in 1957, Kansas City Bridge Company began receiving sections of the steel pipe to be laid at a job site at the Pelican Island end of the crossing, and for sometime thereafter was engaged in welding short sections of this pipe into 400 foot lengths, testing the welds, and covering this pipe with a protective wrapping. Meanwhile, in December, 1957, and January, 1958, a large "whirley" or crane barge was used to dredge the ends of the trench, outside of the harbor lines. A cavein of the bulkhead at the northeast corner of Slip A, caused by this dredging, was repaired in December, 1957. In January, 1958, a bulldozer was used to cut a 400 foot ditch on Pelican Island into which the long sections of pipe could be placed preparatory to their being drawn into the water.

4. On January 27, 1958, pulling cables were stretched across the channel, and the leading section of each pipeline was hung below a barge at the Pelican Island end. On the ensuing four days, the two pipelines were drawn behind this barge and laid in the trench across the channel which had been dug to receive them. On January 31, 1958, the channel was cleared again for marine traffic. Between February 6 and February 25, 1958, the whirley barge was employed as riser sections were welded to the two pipelines, first at the Galveston Island end, then the Pelican Island end. Between February 27 and March 4, 1958, divers

were used to walk the pipelines and ascertain their position and alignment. The whirley barge was used to uncross the lines at one point in mid-channel during this work. On March 5, the lines were filled with water for hydrostatic pressure tests, and they remained filled with water until the later casualty.

5. The remaining work on the pipelines prior to the casualty in suit, which occurred on March 21, 1958, was concerned with the construction of a thrust block over the risers at the Galveston Island end, just east of the entrance to Slip A, and immediately in front of the bulkhead between Slip A and Pier 41. Sleeves were welded around the risers where they passed through the bulkhead, a wooden form was constructed for the thrust-block, and this was lowered into place over the risers after the ground had been cleared by a diver. On the morning of March 21, and at the time of the casualty, concrete was being poured for this thrust-block. A diver was then below directing this work, and his tenders were on the deck of the whirley barge which lay at the northeasterly corner of Slip A, and partly into that Slip. The crane of the whirley barge extended over the work area. On the channel side of the bulkhead, a small "sea mule" and a larger flat barge were immediately above and adjacent to the work area, and personnel employed by Kansas City Bridge Company were on these work boats as well as upon the bulkhead.

6. In addition to the physical evidence already related showing the construction and placement of these pipelines across the channel, and to the notice thereof contained in the permit issued by the United States Corps of Engineers, at least three "Notices to Mariners" had been issued by the Corps of Engineers, on November 15, 1957, December 23, 1957, and January 16, 1958, advising of this construc-

tion. On December 30, 1957, double signboards, measuring 7 feet 10 inches, by 16 feet, on each face, and bearing large letters reading "WARNING -PIPE CROSSING— DO NOT DRAG ANCHOR" were placed on either side of the channel, the sign on the Galveston side being centered about 31 feet east of the center line established for the crossing, and the sign on the Pelican side being centered about 115 feet east of this center line. The legend of either sign was easily visible to any ship proceeding up or down the channel.

7. The Israeli ship HAR CANAAN is a dry-cargo vessel of 10,311 gross tons. Her length is 515 feet 2 inches, and her beam is 66 feet 7 inches. She carried two anchors forward, each weighing approximately 8900 pounds. At the time of this casualty the ship was light and drawing approximately 10 feet. Her forecastle deck was approximately 40 feet above the water line, her bridge deck was approximately 60 feet above the water line, and the horizontal distance from the hawse-pipes in the bow of the ship to the bridge was about 200 feet.

8. On the morning of March 21, 1958, the HAR CANAAN was fully manned, equipped and seaworthy excepting that her main engines were shut down for repairs. Her agents at Galveston, Strachan Shipping Company, gave an order to Bay-Houston Towing Company to furnish three tugs and a pilot to move the HAR CANAAN as a "dead" ship from Pier 15, where she was then lying, to Sunset Grain Elevator at the inner end of Slip A. The distance between these points was approximately two miles.

9. Bay-Houston Towing Company held a contract with Maritime Overseas Corporation, operator of the HAR CANAAN, to move its vessel on stated rates and terms.

10. The only towing companies offering tug service for shifting ocean going vessels in the port of Galveston at the time in question were Bay-Houston Towing Company, Suderman & Young Towing Company, and Intracoastal Towing & Transporation Company. Each of these companies owned a number of harbor tugs. These three "owning companies" competed with one another in the sense that they solicited their own business, made their own contracts, and invoiced the towed vessels for the service performed. However, the services which were available to the owners and operators of ocean going vessels in the port of Galveston from the three "owning companies" were identical. This comes about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G. & H. Towing Company, an operating Company, which was owned jointly by the three "owning companies". In carrying out the orders for towing service, G. &. H. Towing Company would use the tugs which were most readily available and convenient, without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed. The contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner. The contracts offered by the three "owning companies" (their owners or charterers) were identical in terms, and upon a single printed form. The rates too were the same, save for an exclusive contract a ten percent (10%) reduction was allowed. The contract with Maritime Overseas was of this nature, and carried the ten percent (10%) discount.

11. Among the other provisions of this contract, to which reference is made for all purposes, was the following

provision, which by reason of its significance is quoted here:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect to all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

12. Captain Emmett Gray, one of the respondents, is full time and salaried employee of G. & H. Towing Company. Prior to March 1, 1958, he had served for several years as night dispatcher for G. & H., and on that date he became Port Captain for G. & H., and was placed in full charge of the dispatching office. Since 1932, he has held an unlimited pilot's license covering Galveston harbor, as well as other adjacent waters. As Port Captain for G. & H., he was the "dead ship" pilot assigned by his employer for all shifting of dead ships within Galveston harbor when the tugs operated by G. & H. were employed. Out of the fixed charge made for shifting a vessel without her power, Captain Gray received a percentage of this charge (in addition to his salary from G. & H.), with the balance of the charge going to the company owning the contract (one of the three "owning companies"), and G. & H. as the operating company. In this regard, it should be noted that Captain Gray's duties with G. & H. did not contemplate,

nor did he accept, employment as a harbor or branch pilot (meeting incoming vessels at the sea buoy, and bringing them, usually under their own power, into Galveston harbor, with converse service for out going vessels.)

13. On the morning of March 21, 1958, Captain Gray boarded the HAR CANAAN as she lay at Pier 15, and assumed the conning of the vessel. He informed her Master of his intention to use the port anchor in turning the ship into Slip A. and the First Mate of the HAR CANAAN, with a deck crew, was stationed in her bow and the anchor made ready for use on orders from the bridge. Thereupon, the HAR CANAAN was moved westerly down the channel toward Slip A, with the Tugs JUNO, ALBATROSS, and J. R. GUYTON, made up alongside and providing the only motive and directional power for the vessel under orders given directly to them by Captain Gray from the bridge of the HAR CANAAN. The Master of the HAR CANAAN was also upon the bridge of his vessel at all times during the maneuver, and he relayed to the First Officer in the bow and the crew orders as received from Captain Gray during the maneuver, including the order to let go the port anchor. The helm of the HAR CANAAN was lashed, as her propelling machinery was shut down, and she had no steerageway of her own.

14. Shortly after noon, as the HAR CANAAN reached the vicinity of Pier 41, she was navigated by the tugs at an angle from the center of the channel toward the opening of Slip A. Captain Gray then ordered the port anchor to be dropped, with one shot of chain, and this order was promptly executed. Subsequently, the bow of the ship, with anchor down, continued to move toward the northeast corner of Slip A and came within about 10 feet of contact with the whirley barge in that position before the anchor was heaved in some five minutes later. Almost im-

mediately after the anchor was dropped, violent movements of the sewer pipe, which was westerly of the two pipes being laid, were perceptible to the workmen on shore as well as to the diver working underwater. Sounds such as would have been caused by the breaking of the pipeline were also heard by the workmen on shore when the anchor of the HAR CANAAN was heaved in. Subsequent investigations did show that the sewer line was badly bent or broken, but still in the trench, at a point approximately 250 feet out in the channel, and was completely broken at a point only 90 feet from the bulkhead, with the ends of the pipe at this point pulled out of the trench and lying in front of the opening to Slip A.

15. Immediately prior to the arrival of the HAR CANAAN at Slip A on the 21st of March, 1958, the water and sewer lines were being constructed by libellants in accordance with the permit duly issued for that purpose, and these two pipelines were properly situated at the depth and in the position prescribed in such permit, as amended December 16, 1957.

16. The port anchor of the HAR CANAAN was dropped on, or dragged over, one, or perhaps both of said lines, on March 21, 1958, breaking the sewer line, the more westerly of the two, and causing damages to each of the libellants in amounts to be determined.

17. Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipelines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible.

18. Captain Gray was not misled by the position of the warning signs, and was negligent in giving the order to drop the anchor without regard to the presence of the pipelines.

19. The tide was nearing the end of the ebb, and the wind was from the southeast at force three, although neither weather, wind nor tide were factors of any consequence in the handling of the HAR CANAAN at the time, and no emergency or necessity required that the anchor be dropped at the place where it was dropped.

20. Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times.

21. The Master of the HAR CANAAN was not negligent in failing to intervene, or displace, the pilot when the order to drop the anchor was issued by Captain Gray, because the situation was not one of obvious danger, and the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master.

22. Neither the Master nor crew of the HAR CANAAN was negligent, or at fault, in any particular.

23. The assisting tugs were properly maneuvered by their crews in accordance with orders given them, and were in no way at fault.

CONCLUSIONS OF LAW

1. Captain Emmett Gray is personally liable for his own acts of negligence.

2. G. & H. Towing Company is liable for the negligence of Captain Gray as its employee.

3. The HAR CANAAN is liable, *in rem*, for the negligence of Captain Gray as her pilot.

4. Libellants are entitled to recover their provable damages, as their interests may appear, from the HAR CANAAN, *in rem*, from G. & H. Towing Company, *in personam*, and from Emmett Gray, individually. The liability so decreed shall be joint and several.

5. Libellants are not entitled to recover from the tugs J. R. GUYTON, JUNO, or ALBATROSS, in rem, or from Bay-Houston Towing Company or Suderman & Young Towing Company, in personam.

The foregoing Conclusions dealing with the liability of the respondents to libellants, in my judgment, follow quite readily from the Findings of Fact set out above, and present no serious question of law.

The libellants obviously were not parties to the contract of towage between Maritime Overseas and Bay-Houston, and the liability of respondents to libellants has been determined without regard to the provisions of such contract.

In considering the question of liability over between the various respondents, however, the validity of the so-called "pilotage" clause (Finding No. 11) is placed in issue.

Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, and the related opinions immediately following. Respondents G. & H. and Captain Gray in supporting the validity of the exclupatory provisions rely primarily on *Sun Oil Co. v. Dalzell Towing Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor, whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an em-

ployee of the towing company, and such towing company did "have power to drive hard bargains."

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power."; and (b) "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. . . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Thus, as to the liability over between the several respondents, the following Conclusions are made.

6. G. & H. Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the HAR CANAAN, for any payment they may be required to make under the decree to be entered herein.

7. Maritime Overseas Corporation, as claimant of the HAR CANAAN, is entitled to indemnity from Captain Emmett Gray, individually, and from G. & H. Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G. & H. Towing Company to Maritime Overseas will be joint and several.

The Clerk of the Court will furnish counsel of record a copy hereof.

Counsel will present appropriate order promptly.

Done at Houston, Texas, this 24th day of December, 1959.

BEN C. CONNALLY
United States District Judge

APPENDIX III

No. 18619

JUDGMENT

Extract from the Minutes of March 15, 1961

EMMETT GRAY, G. & H. TOWING COMPANY, and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Emmett Gray and G. & H. Towing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX IV

PERTINENT CONTRACT PROVISIONS

BAY-HOUSTON TOWING CO.

* * *

"The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195____

"The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

"Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

"Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

"This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

"All charges are net, except when services are performed under contract, then a discount of 10% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

"We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By_____"

(In the provisions covering Assisting Vessels, at Galveston-Texas City, but not under the provisions for services at other named ports, the contract had a provision "Pilotage-Shifting Vessels Without Own Power . . . . . 60.00")

APPENDIX V

TUGS:

C. R. HADEN
H. O. WEATHERBEE
J. R. GUYTON
JENNIFER GEORGE

LAURA HADEN
LUCY HADEN
R. T. McDOW
R. J. WALES

W. A. WANSLEY

[redacted] BARBARA GEORGE
J. HARRIS MASTERSON

TUG BOAT HARBOR TARIFF
EFFECTIVE APRIL 10, 1957

BAY-HOUSTON TOWING CO.

GALVESTON
504 National Hotel Bldg.
Phone 5-9381
Pier 10 Wharf Phone: 3-4673
Night Phones: { 3-4673 - 5-7534 / 5-6542

HOUSTON
811 Cotton Exchange Building
Phone: CApitol 2-6231
Dock Phone: WAinut 8-5406
Night Phones: { JAckson 4-8635 / UNderwood 9-2701

CORPUS CHRISTI
Ore Dock
Phone: TUlip 4-8791 & TUlip 3-7843
Night Phone: 53 Ingleside

Gulf Coast Towing, Harbor Towing, Oil Lightering and Transportation

OIL BARGE IPS 201

CORRESPONDENCE AND WORK SOLICITED

B Tug Calls:_____ ____ _____**(Long, Short, Long)**
H Tug Calls:_____ ____ _____ ____**(Long, Short, Long, Short)**

MICRO C

TRADE M

PC 133

CARD

ARK ®

22

MATTHEW BENDER & COMPANY

MB

6-1

:nicrocard®

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

ASSISTING VESSELS

GALVESTON — TEXAS CITY

Docking or Off Docking, at Galveston, per tug	$180.00
Shifting, Dock to Dock, per tug	205.00
Off docking and to Bolivar Roads, per tug	230.00
Off docking and to Texas City and Docking, per tug	330.00
Bolivar Roads to Texas City or vice-versa, per tug	230.00
Docking, Off Docking, or Shifting at Texas City, per tug	230.00
Towing vessels or ocean-going barges from Galveston Bar to Bolivar Roads, Texas City or Galveston Docks, per tug. Per hour or fractional part. Running time chargeable	105.00
Shifting derrick barges—Galveston Harbor	85.00
Galveston to Bolivar Roads	85.00
Galveston to Texas City	135.00
Pilotage—Shifting Vessels Without Own Power	60.00

SPECIAL SERVICES

Pulling on ships aground:	
When tug is engaged in assisting vessel, one-half hour free pulling time, each succeeding hour or fractional part	$ 80.00
When Tug not engaged in assisting vessel. Per hour or fractional part. Running time chargeable	95.00
Furnishing and delivering water to ships at anchorage. Per Trip	200.00

IN TOWING VESSELS OR BARGES TOWED VESSELS TO FURNISH HAWSERS.

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Galveston and $90.00 at Texas City will be made.

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $60.00 per hour, with one-half hour free time allowed.

HOUSTON SHIP CHANNEL

BETWEEN	
Morgan's Point and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	$380.00
Morgan's Point and Baytown	230.00
Bolivar Roads and Morgan's Point or Baytown	430.00
Bolivar Roads and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	455.00
Galveston and Baytown	440.00
Texas City and Baytown	440.00
Houston and Norsworthy, Crown, Galena or Sinco	240.00
Houston and Todd Shipyards, Port Adams, Sheffield, Shell or Ordnance Depot	330.00
Galveston and Houston	580.00
Bolivar Roads and Houston	580.00
Texas City and Houston	580.00
Morgan's Point and Houston	430.00
Houston and Baytown	405.00
Baytown and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	380.00

(Norsworthy, Crown, Galena, Sinco, Clinton, Manchester take same rates as Houston from above points.)
Above charges including Docking or Off Docking.

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

HOUSTON SHIP CHANNEL
DOCKING AND OFF DOCKING

Docking or Off Docking at all points between Manchester Terminal and Turning Basin, both inclusive	$180.00
Docking or Off Docking at points below Manchester to Norsworthy, inclusive	150.00
Docking or Off Docking at points below Norsworthy to Ordnance Depot, inclusive	230.00
Docking or Off Docking at Baytown	200.00

SHIFTING

Shifting vessels between docks at Manchester Terminal and Turning Basin, both inclusive, per tug	$205.00
Shifting vessels between points below Manchester to Norsworthy, inclusive, per tug	230.00
Shifting vessels from one point to another on the same dock between points below Norsworthy to Ordnance Depot, inclusive	280.00
Shifting vessels between points below Norsworthy to Sheri, inclusive, per tug	330.00
Shifting from one berth to another at Baytown	230.00

MISCELLANEOUS SERVICES

Pulling on ships aground

When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part 80.00

When tug is not engaged in assisting vessel, per hour or fractional part 95.00

Running time chargeable

The above rates to apply for a single tug

Tugs ordered to stand by but not put to work will be charged for the same as if pulling

Rates for towing dead ships between points on Houston Ship Channel other than above specified, will be charged for on "pulling time basis"

All towed vessels to furnish towing hawsers

Holding vessels off dock and redocking, shifting rates to apply

Standing by or holding vessel in stream or alongside bank waiting for berth, pulling time rate will apply

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charge of $80.00 will be made

Furnishing and delivering water to ships Per Trip 200.00

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $80.00 per hour with one half hour free time allowed

PORT ARANSAS — CORPUS CHRISTI

Docking, off docking or shifting at Harbor Island	$280.00
Assisting between Harbor Island and Corpus Christi	430.00
Sea to Ingleside	380.00
To dock at Ingleside	
When tug is at Ingleside	280.00
When tug is not at Ingleside	380.00
Assisting between Ingleside and Harbor Island	380.00
Assisting between Ingleside and Corpus Christi	380.00
Sea to Corpus Christi and dock	430.00
From outside bridge at Corpus Christi and to dock at Turning Basin wharves	210.00
To dock at wharves in Corpus Christi Turning Basin	180.00
Shifting in Corpus Christi Turning Basin	205.00
Sea to Terminal of the Reynolds Metal Company (Near Ingleside)	395.00
Docking or undocking at the Terminal of the Reynolds Metal Company (Near Ingleside)	395.00
From outside bridge to all points between Sunray Dock and Oil Docks 3 & 4 inclusive	230.00
From Turning Basin inside the bridge to above docks	220.00
To docking or off docking at above docks	220.00
To shifting between above docks or between above docks and docks in Corpus Christi Turning Basin	220.00
Pulling on ships aground	
When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part	80.00
When tug is not engaged in assisting vessel, per hour or fractional part	95.00
Running time chargeable	
When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Corpus Christi and Harbor Island, and $50.00 at Ingleside, will be made	
The above rates to apply for a single tug	
Detention—One half hour free time, thereafter, per hour	60.00
Furnishing and delivering water to ships at Harbor Island, Ingleside or Corpus Christi Per Trip	200.00

OVERTIME RATE

20% will be added to the tariff rates for all work performed between the hours of 5 P M and 7 A M, also for work performed on Sundays and Holidays, and Mondays following Holidays

Overtime Rate to apply when service is started and or completed in an overtime hour

Starting time will be the time Tug leaves berth and time of completion will be the time Tug returns to berth

FORCE MAJEURE

Neither party shall be responsible for delays, failures or omission hereunder due to strikes, lockouts, labor disturbances, riots, fire, earthquakes, storm, lightning, epidemics, war disorders, acts of God, etc.

The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195__

The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

All charges are net, except when services are performed under contract, then a discount of 10% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By _____

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 25 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 277

G. & H. TOWING COMPANY,
Petitioner

vs.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
Respondents

RESPONDENTS EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, AND PELICAN ISLAND DEVELOPMENT CORPORATION'S REPLY TO PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY G. & H. TOWING COMPANY, PETITIONER

GRIFFITH D. LAMBDIN
National Hotel Building
Galveston, Texas

McLEOD, MILLS, SHIRLEY & ALEXANDER
801 Santa Fe Building
Galveston, Texas

Of Counsel:

PRESTON SHIRLEY
801 Santa Fe Building
Galveston, Texas

Clarke & Courts, Galveston

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Petitioner

vs.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
Respondents

RESPONDENTS EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, AND PELICAN ISLAND DEVELOPMENT CORPORATION'S REPLY TO PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY G. & H. TOWING COMPANY, PETITIONER

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Libellants in the Trial Court—Edwin E. Johans-

son, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation, and Pelican Island Development Corporation—denying jurisdiction as to them and denying error respectfully pray that the petition of G. & H. Towing Company be denied.

The petition of Emmett Gray (Cause No. 276) and the petition of G. & H. Towing Company (Cause No. 277), we believe, both should have been filed by Petitioners in one case rather than splitting a single case into two separate causes, Nos. 276 and 277, in this Court. The case was tried in the Trial Court as a single case and was heard by the Court of Appeals in the same manner. Since, however, separate petitions have been filed here, we deem it necessary to answer separately. However, in order to give this Court the background on each petition, a considerable part of our Reply Statement and Argument will be identical in each cause.

STATEMENT AND ARGUMENT

Libellants below, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation and Pelican Island Development Corporation (hereinafter referred to as Libellants), being all the parties jointly interested in two pipe lines across Galveston Channel, recovered judgment in the Trial Court in rem against the Motor Vessel HAR CANAAN (whose anchor caught and broke one of these lines and whose claimant is Maritime Overseas Corporation) and in personam against Emmett Gray for his negligence and against G. & H. Towing Company, as

the employer of Captain Gray, jointly and severally, for the damages sustained by reason of the negligent dropping of the HAR CANAAN'S anchor (R. 887). The Trial Court held that "Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipe lines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible" and "Captain Gray was not misled by the position of the warning signs and was neglig nt in giving the order to drop the anchor without regard to the presence of the pipe lines." (Findings Nos. 17 and 18, R. 883-884) and concluded that Captain Gray "is personally liable for his own acts of negligence" (Conclusion of Law No. 1 - R. 885). The Trial Court further found that "Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times" (Finding No. 20, R. 884) and concluded that "G. & H. Towing Company is liable for the negligence of Captain Gray as its employee" (Conclusion of Law No. 2 - R. 885). The HAR CANAAN was held liable in rem for the acts of Captain Gray (R. 885). Maritime Overseas Corporation (the claimant of the HAR CANAAN) concedes that if Captain Gray was negligent, the vessel is liable in rem.

Therefore, insofar as these Libellants are concerned, the case involves only fact questions as to the negligence of Captain Gray and his acting in the

course of his employment of G. & H. Towing Company.

Additionally, in the Trial Court, the HAR CANAAN and its claimant—Maritime Overseas Corporation (both hereinafter referred to jointly as Maritime) on one side and Captain Gray and the G. & H. Towing Company on the other side, extensively litigated the question of the so-called "pilotage clause" and the various rights of indemnity and contribution claimed between themselves. Libellants secured a judgment jointly and severally against the HAR CANAAN in rem, Captain Gray and the G. & H. Towing Company. We are not concerned with these various cross-claims as between these three parties.

The HAR CANAAN and its claimant, Maritime Overseas Corporation, appealed, claiming that Captain Gray was not negligent and, therefore, that the ship was not liable. The Court of Appeals on the fact question of negligence held against the Appellants, HAR CANAAN and Maritime Overseas Corporation. These Appellants did not file a motion for rehearing in the Court of Appeals and have not applied for certiorari here. We take it, therefore, that here as between us (Libellants below) and the HAR CANAAN in rem and Maritime Overseas Corporation as claimant, there is no question in dispute or controversy.

G. & H. Towing Company took its appeal and while complaining in part as to the Trial Court's finding of fact that Captain Gray was negligent and an employee of G. & H. Towing Company, primarily argued the effect of the pilotage clause and the indem-

nity features between it, G. & H. Towing Company, and Maritime. Captain Emmett Gray also appealed, contending that under the pilotage clause, he was entitled to some form of exoneration and second, that he was not negligent. The Court of Appeals affirmed the Trial Court's findings of fact to the effect that the Appellant, Captain Emmett Gray, was negligent and that he and his employer, G. & H. Towing Company, were liable to us.

The Court of Appeals further held that Maritime was entitled to indemnity over against Gray and G. & H. Towing Company. Again, we are not interested in a controversy between Gray and the G. & H. Towing Company on the one hand and Maritime on the other.

The Petition for Certiorari here primarily deals with the controversy between Petitioner and the HAR CANAAN in rem and its claimant, Maritime Overseas Corporation.(1)

We cannot accept the "Statement" made in the petition as accurate in that it ignores most of the facts favorable to us, but in view of the limited argument made against us and our reply here, we do not believe that it would materially benefit this Court to make a more complete and accurate statement. If the Court

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(1) Strangely enough, while we are only involved in a minor way, we are named as the sole Respondents in the petition. Maritime Overseas Corporation and the HAR CANAAN are the parties against whom practically everything in the petition is directed but were not made or named as Respondents in the petition.

desires a more complete statement, we refer to Pages 1 to 39 of our Brief in the Court of Appeals.

With one possible exception, the reasons asserted in the petition for granting the writ and the argument all deal with the question of validity of the pilotage clause and of indemnity and contribution between petitioner, G. & H. Towing Company and the HAR CANAAN and its claimant, Maritime Overseas Corporation.

Answering the only part of the petition possibly directed against us—on Pg. 27 of the petition, it is argued that Captain Gray was a loaned servant and that the G. & H. Towing Company should not be liable as his employer. While this argument is based in substance on the pilotage clause by which we are not bound, if it is to be regarded as an argument against liability as to us, the record furnishes a clear answer. As to us, we were not parties to the pilotage clause and, therefore, are not bound by it. The Trial Court found the facts clearly showing that Captain Gray was an employee of the Petitioner, G. & H. Towing Company, at the time of the actions complained of (Finding No. 12. R. 881) and concluded that the G. & H. Towing Company" is liable for the negligence of Captain Gray as its employee" (Conclusion of Law No. 2 - R. 884).

Additionally, Captain Gray testified that on March 21, 1958, he was Port Captain for G. & H. Towing Company (R. 157); that he worked for G. & H. Towing Company from 1927 until 1935 and left them

in 1935 and returned to work for them in 1945 and had been working for them ever since (R. 158); that the orders to move ships came to Pier 10 office of G. & H. Towing Company and that he was in charge of a part of this office (R. 161); that on the occasion in question, he was not at Pier 10 when the order was received to move the ship but when he arrived back at Pier 10, his assistant said "you got another ship to go"; that he then took three tugs and went over to the location of the HAR CANAAN (R. 162).

Captain Gray further testified that he became Port Captain in March, 1958 (R. 821); that G. & H. Towing Company paid him compensation as a Port Captain but he also received compensation for every dead ship he handled; that when he became Port Captain, he also automatically became G. & H. Towing Company's dead ship pilot because that was a part of the Port Captain's job; that his extra fees for dead ship pilot work were also paid him by G. & H. Towing Company (R. 822); and that the dead ship piloting was a part of his job for G. & H. Towing Company (R. 824).

The witness, F. D. Harlan, Vice-President and Secretary of G. & H. Towing Company, testified that G. & H. Towing Company employs the dead ship pilots who are on its payroll as such; that this job usually carries the title of Port Captain; that the G. & H. Towing Company's Port Captain is in charge of the dispatching office and has the duty of acting as dead ship pilot with a monthly compensation (R. 786); that

when the Port Captain, such as Captain Gray, would act as dead ship pilot he receives additional compensation; that G. & H. Towing Company charged an extra $60.00 for Captain Gray's acting as a dead ship pilot of which amount Captain Gray received $20.00; G. & H. Towing Company received 65 % of the remaining $40.00 and the particular contracting towing company (in this case—Bay-Houston) would receive 35% of the remaining $40.00 (R.795).

Captain Gray gave the order to drop anchor (R. 208-209).

Under these facts, Captain Gray was a full time employee of G. & H. Towing Company as a port Captain. His services as a dead ship pilot for the towing company was an essential part of his duties and G. & H. received a substantial part of the extra charge made for Captain Gray's services. Therefore, as a matter of fact, G. & H. Towing Company is liable for the negligent acts of Captain Gray by reason of the employer-employee relationship. As to us, the provisions of the pilotage clause were not effective and, as to us, G. & H. Towing Company is liable as employer for the negligence of its employee or servant, Captain Gray. Each time this particular question has been raised as to third parties such as us, it has been held that liability exists. Perhaps the fullest discussion of the question is found in **People of the State of California vs. The Jules Fribourg**, 140 Fed. Supp. 333 (D.C. N.D. Cal. 1956 and cases cited there), and in **Pennsylvania Railroad Co. vs. The S. S. Beatrice**, 161

Fed. Supp 136 (D. C. S. D. N. Y. 1958). We submit that the holdings of these cases, and the cases cited therein, are correct. In view of the fact that the petition of G. & H. Towing Company only incidentally raises this question and is obviously directed primarily to the indemnity and contribution controversy between it and the HAR CANAAN and its claimant, Maritime Overseas Corporation, no further citation will be made on this point.

We, therefore submit, that as to us, the petition should be denied. Again, we are not interested in the controversy betwee nG. & H. Towing Company and Maritime as to indemnity and contribution. There are no substantial questions of law involved as between Petitioner and us and we submit no basis for the granting of a writ here.

If any questions of law are presented here, they are limited to the controversy between Petitioner G. & H. Towing Company on the one side, and Maritime on the other as to indemnity and contribution. The HAR CANAAN and Maritime are the real Respondents here—not us.

CONCLUSION

The Respondents, Edwin E. Johanson, Kansas City Bridge Company, Merritt-Chaptman & Scott Corporation and Pelican Island Development Corporation, respectfully pray that the petition of G. & H. Towing Company be denied, and in the alternative that any grant of certiorari be limited to the controversy between such Petitioner and the HAR CANAAN and Maritime Overseas Corporation.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing Respondents Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation, and Pelican Island Development Corporation's Reply to Petition for Writ of Certiorari has been mailed on the 22 day of August. 1961, to Mr. Robert Eikel, 1910 Tennessee Building, Houston 2, Texas, Attorney for Emmett Gray and for Petitioner G. & H. Towing Company, and Eastham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, Attorneys for Respondent, Maritime Overseas Corporation, Claimant of the M/V HAR CANAAN.

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NO. 277

IN THE

Supreme Court of the United States

October Term
1961

G & H TOWING COMPANY, *Petitioner*

versus

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP., *Repondents*

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

BRIEF OF MARITIME OVERSEAS CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY G & H TOWING COMPANY, PETITIONER

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Repondents

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

BRIEF OF MARITIME OVERSEAS CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY G & H TOWING COMPANY, PETITIONER

To The Honorable, The Chief Justice of The United States And The Associate Justices of The Supreme Court of The United States:

Maritime Overseas Corporation is not named as a respondent in the petition of G & H Towing Company for

Writ of Certiorari. However, inasmuch as the relief prayed for by Petitioner in the prayer of its petition, if granted, would be prejudicial to the position of Maritime Overseas Corporation, it files this opposition thereto, denying jurisdiction, and denying error, and respectfully prays that the petition of G & H Towing Company herein be denied.

Questions Presented For Review

It is the position of Maritime Overseas Corporation that there are no questions properly presented for this Court's review in this case, because the decisions of the District Court and the Court of Appeals were the result of the application of well settled legal principles to facts found on competent evidence. However, if there are any questions to be passed upon by this Court, we certainly do not agree that they are correctly stated in the petition, and those purported questions are therefore challenged as follows:

I.

This case does not present, as Petitioner contends in Article I of its petition, the question of whether a "pilotage" clause of the type generally used in American harbors is lawful. In the first place, the pilotage clause here involved was not of the type generally used in American harbors because it was not restricted to those vessels which were maneuvering under their own power in control of their own crews. Morever, this was not a case, as Petitioner states in its petition, where an ocean going vessel with her master in command upon her bridge and with a full crew at their stations was being shifted by tugs. Instead, this was a case where a dead ship, the main engines of which were dismantled and inoperative, and the helm of which was lashed, was being towed from one berth to another within

the confines of Galveston harbor solely by tug power, and under the command of a towing company employee who was furnished by the towing company on its own initiative, not at the request of the vessel to be towed, to direct the shifting operation. This towing company employee, Captain Gray, was on the bridge of the ship actually directing the movement, and although the master of the ship was also on the bridge he was not commanding, and in fact could not command the operation as he was unable to direct the tugs and unable to move his ship in any direction by the use of her own rudder and wheel. There was not, as Petitioner states, a full crew at their stations; there were no engine room personnel at their stations because the engines were inoperable; there was no helmsman at the wheel because the helm was lashed amidships; there was no mate at the engine order telegraph because it was secured. Although Captain Gray was the holder of a pilot's license from the Federal government, he was not a state licensed bar pilot or a member of the Galveston Pilots Association, but was simply the employee of the towing company furnished by the latter to conduct the towing operation. Maritime Overseas Corporation made no contract with Captain Gray to pilot the M/V "Har Canaan", and they paid him no fee for his services. Neither is it true, as is stated in Article I of the petition, that the master ordered the ship's crew to drop the vessel's anchor. It was found as a fact by the District Court in no less than three separate findings (See Findings of Fact No. 17, 18 and 21, R. 883 and 884) that Captain Gray, not the master, issued the order to drop the anchor, and this was an act performed in the course of the towage operation.

While it is true, as Petitioner states, that the towage contract contained no words attempting to relieve the

tugs or their owners from liability for negligent towage, the contract did purport or attempt to relieve the towing company from liability for the negligence of a pilot. Starting with this premise, the towing company then attempts to denominate the employee furnished by it to conduct a towing operation a "pilot" and to denominate the towage service performed "pilotage", and to thereby do by indirection what it could not do directly, that is, to relieve itself from liability for negligent towage. Thus, the question, if any, is not whether Your Honors held in *Bisso v. Inland Waterways Corporation* (1955), 349 U.S. 85, that pilotage clause was invalid, but whether the Courts below in the instant case were correct in holding in accordance with the rule announced by Your Honors in the *Bisso* decision, that a clause which would in effect exempt a towing company from liability for the negligence of its towing employees was invalid and unenforceable regardless of the fact that the towing company attempted to denominate the service which it performed "pilotage" and regardless of the fact that the towing company attempted to denominate its employee a "pilot". The question, if any, we submit was laid to rest by the decision of the Court of Appeals, 287 F. 2d 852 at P. 854 where it was said:

> "Of this, we think it sufficient to say that we agree: with the District Judge's conclusion that the Libellants, strangers to the contract, cannot, of course, be held bound or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that Appellants are bound and precluded by the decision and holding in *Bisso vs. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. 911, that such a clause is invalid. In addition, we think it clear, that respondents' reliance on *Sun Oil Co. vs. Dalzell Towing Co.*, 287 U.S. 291, 53

> S. Ct. 135, 77 L. Ed. 311, will not at all do here, both because of the decision in the *Bisso* case, which, on full consideration, rejected the *Dalzell* case as authority for the position here taken, and because the *Dalzell* case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in this case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain, who, though denominated 'pilot' was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the *Bisso* case, and the judgment denying effect to the invoked clause of the contract must be affirmed."

None of the cases cited by the Petitioner in Article I of its brief for the proposition that a pilotage clause is valid is in point in this case, because all of those cases involve situations in which the vessels were actually being controlled by their own crews through the use of their own propulsion and steering machinery and were merely being *assisted* by the pilot and the tugs. They were not cases, as was the one at bar, wherein a ship, without the use of her own propulsion machinery or rudder, and having no control over her own movements, was being moved entirely by tug power under the direction of a towing company employee. Thus, we repeat that the question is not whether Your Honors held in *Bisso v. Inland Waterways Corp.*, supra,

that a *pilotage* clause is invalid, but whether the Courts below were correct in holding, in accordance with the *Bisso* decision, that such a *pilotage* clause cannot be enforced in a case where it has been found as a matter of fact that *towage* and not pilotage was involved.

II.

We disagree with the Petitioner where it states in Article II of its petition that the question is here presented whether the Courts below were correct in holding that Petitioner, G & H Towing Co., was liable for the negligence of the pilot in the dropping of the anchor, or whether the pilot was an independent contractor and a borrowed servant of the ship for whose acts the Petitioner towing company was not responsible. No such question is presented by the record in this case. Initially, it must be repeated that the Courts below did not find that Captain Gray was a pilot as stated by Petitioner. To the contrary, they found that he was no more than a full time, regular *towing* company employee supplied by his employer, G & H Towing Co., to be in charge of the overall *towing* operation. He was not a state licensed bar pilot, and was not a member of the Galveston Pilots Association. There was no contract of employment between the operators of the M/V "Har Canaan" and Captain Gray for the latter to act as pilot aboard the ship, and no pilotage fee was paid by the ship operators to Captain Gray. In fact, there was no contact whatsoever between Maritime Overseas Corporation and Captain Gray until the latter appeared aboard the M/V "Har Canaan" on instructions from his employer, G & H Towing Co. This was not a case, as petitioner states, wherein the ship was being maneuvered under the command of her own master and crew through the use of her own

propulsion and rudder power, and merely being assisted by tugs and a pilot, but was one in which the entire movement of the ship was within the sole control of the towing company through the latter's tugs and through its employee, Captain Gray. Accordingly those true pilotage cases cited by Petitioner are not in point here and no legitimate question of Captain Gray's being an independent contractor or a borrowed servant is properly presented by the record.

Additionally, the Court's attention is invited to the fact that Petitioner here again erroneously states that the record shows that the master gave the order to drop the anchor and that Captain Gray, the towing company employee, was acting only in an advisory capacity. To the contrary, the District Court found in no less than three separate findings (Findings of Fact No. 17, 18 and 21, R. 883, 884) that Captain Gray, not the master, issued the order to drop the anchor, and further, that Captain Gray, not the master, was conning the M/V "Har Canaan" (Finding of Fact No. 13, R. 882).

Statement

The incidents giving rise to this litigation occurred on March 21, 1958. At that time, the M/V "Har Canaan", a foreign flag ship, was undergoing repairs on her main engine, which was partly dismantled and inoperative. Her wheel was lashed with her rudder amidship and her engine telegraph was secured. (R. 667, 671). Her master and third mate were on her bridge and her chief officer and seamen were by her anchors. Her crew was aboard, but under the circumstances were little more than passengers. The ship was scheduled to be shifted from Pier 15 to the Sunset Grain Elevator at Slip A within the Port of Galveston,

Texas (Finding of Fact No. 8, R. 879). It was therefore necessary for this shift to be made entirely by tug power (R. 671). Accordingly, Maritime Overseas Corporation's Galveston agent called the office of Petitioner, G & H Towing Company, at Pier 10, Galveston, advised the said G & H Towing Company, which was the only towing company furnishing harbor tugs in the Port of Galveston, Texas (Finding of Fact No. 10, R. 880), that the "Har Canaan" should be shifted at 12:00 noon as a "dead ship" from Pier 15 to Sunset Elevator, and asked the said G & H Towing Company to handle the shifting operation. The three tugs, directions as to their positioning, all maneuvers, and the entire operation were under the sole control of Petitioner, G & H Towing Co., and Maritime Overseas Corporation was interested only in the ultimate result of having the ship berthed at Sunset Grain Elevator. The anchor of this particular vessel is dropped by merely releasing a brake at the electric anchor windlass and its weight carries it out. The ship's master was an infrequent caller at the port, a stranger to the area of the Slip A vicinity, had no knowledge about the pipelines in the vicinity, and had no pilot's license for the port. The ship's agent, in notifying G & H Towing Company when to shift the M/V "Har Canaan", did not specify the number or type of tugs that were to be supplied for the operation, nor did he request that G & H Towing Company furnish a pilot for the operation (R. 726). In response to this telephone conversation, G & H Towing Company furnished the three tugs that moved the ship, and also sent along, on its own initiative, and for its own benefit and convenience, its port captain and so-called "dead ship" pilot, Captain Emmett Gray, a regular employee of G & H Towing Company, to direct the movement of the flotilla

(R. 162). The three tugs so furnished by G & H Towing Company, under the direction of Captain Gray, its employee, supplied the sole motive, maneuvering, navigating and directional power for the movement of the ship throughout the entire operation, and the said Captain Gray gave all orders during the shifting operation (R. 671, 673, 674). We call attention, at this point, to our quotation from the opinion of the Court of Appeals on Page 4 hereof.

As the flotilla was approaching, and/or entering Slip A, Captain Gray, the employee furnished by G & H Towing Company to be in charge of the overall towing operation, gave the order to drop the ship's port anchor (Findings of Fact Nos. 14 and 17, R. 882 and 883, respectively). The anchor brake of the M/V "Har Canaan" was released and the anchor accordingly was dropped as directed, and resulted, according to the findings of the District Court, undisturbed by the Court of Appeals, in damage to one or both of two sub-aqueous pipelines in which the named respondents herein were interested.

The District Court found, upon abundant credible evidence, that Captain Emmett Gray was acting as the employee of Petitioner, G & H Towing Company, at all times material hereto, and was not a loaned servant to the vessel or her operators (Finding of Fact No. 20, R. 884); that the master of the M/V "Har Canaan" was not negligent in failing to intervene or displace Captain Gray (Finding of Fact No. 21, R. 884), and that neither he nor any other officer or member of the crew of the M/V "Har Canaan" was in any way negligent (Finding of Fact No. 22, R. 884). The Court concluded that G & H Towing Company was liable for the negligence of Captain Gray as its employee (Conclusion of Law No. 2, R. 885), and that the M/V "Har

Canaan" was liable "in rem" for the negligence of Captain Gray because he was lawfully in charge of her. No in personam liability was found against Maritime Overseas Corporation, claimant of the M/V "Har Canaan". The District Court awarded indemnity to Maritime Overseas Corporation, as claimant of the M/V "Har Canaan", against Captain Gray and his employer, G & H Towing Company for the "in rem" liability imposed against the M/V "Har Canaan" by reason of the negligent act of Captain Gray (Conclusion of Law No. 7, R. 897); and held that the so-called "pilotage" clause in the contract between Bay-Houston Towing Co. and Maritime Overseas Corp. did not shift the responsibility for Gray's negligence from Gray and G & H to Maritime Overseas Corporation; that this was in fact a towage operation, not a pilotage operation, and that such release towing agreements and recitations of employer-employee relationship when none in fact existed had been held by this Court to be invalid as against public policy in *William A. Bisso v. Inland Waterways Corporation*, supra. Finally, the District Court concluded that even if the so-called pilotage clause were not void under the *Bisso* decision, it would not afford to G & H Towing Co. or to Captain Gray a basis for indemnity against Maritime Overseas Corporation because it was not sufficiently broad in terms to encompass that remedy (R. 873).

The Fifth Circuit Court of Appeals affirmed the holding of the trial court that the negligence of Captain Gray alone was responsible for the damages in the case, and that Maritime Overseas Corporation, whose vessel, the M/V "Har Canaan", was held liable in rem solely because of the negligence of Captain Gray, was entitled to indemnity against

the said Captain Gray and against his employer, G & H Towing Company for the in rem liability imposed against the ship by reason of Gray's negligence. The Court of Appeals specifically approved the District Court's holding that the so-called pilotage clause was inapplicable and as a defense was invalid, and did not suffice to impose liability against Maritime Overseas Corporation for the negligence of Captain Gray, because this was, under the proven facts, a towage situation, not a pilotage situation, and the exculpatory clause, being an attempt to release a towing company from liability for its own negligence, was void as against public policy under the holding of this Court in *William A. Bisso v. Inland Waterways Corporation*, supra. (Please see the opinion of the Court of Appeals at 287 F. 2d 852.)

Reasons For Not Granting The Writ

Your Honors should refuse to grant a writ of certiorari in this cause for the following reasons:

1. There was no error in the decisions of the District Court and the Court of Appeals.

2. The opinion of the Court of Appeals is not in conflict with that of any other Court of Appeals or with this Court in any other case.

3. No public interest of importance is here involved.

4. Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings initially made by the District Court on ample evidence, which fact findings were approved by the Court of Appeals as not clearly erroneous; there are no questions to be passed on by this Court.

ARGUMENT

I.

There Was No Error in the Decisions of the District Court and the Court of Appeals

A. The District Court and Court of Appeals were correct in applying the rule of the Bisso Case to the facts here found.

Petitioner assails the holdings of the District Court and the Court of Appeals for failing to apply certain authorities upholding pilotage clauses to the case at bar. However, Petitioner fails to recognize, or recognizing, insists on ignoring the fact that *this situation was found, on competent evidence, by the District Judge, to be one of towage, rather than pilotage*, and this finding was specifically approved by the Court of Appeals. Petitioner apparently is contending that since it called its employee, Captain Gray, a "pilot", called the job which he was performing "pilotage", and called the exculpatory clause in the contract a "pilotage" clause, that pilotage authorities should have been applied in the case, in spite of the fact that the ship had no propulsion or maneuvering power and the Court found the facts to be that such pilotage as is mentioned in Petitioner's authorities was not here involved. It is submitted that the District Court and the Court of Appeals were eminently correct in applying to the facts of this case the holding of this Court in *Bisso v. Inland Waterways Corporation*, supra, and in distinguishing *Sun Oil Co. v. Dalzell Towing Co.* (2 C.C.A. 1932) 55 F. 2d 63, aff'd. 287 U.S. 291, because the former involved *towage*, and thus was a direct precedent, and the latter involved *pilotage* and thus

was not in point. We are unable to find a case in American Jurisprudence holding that a so-called pilotage clause, such as the one here involved, was valid and enforceable under the facts here found by the District Judge on the proofs presented.

The flaw in Petitioner's argument could not be more clearly defined than it was in the words of Judge Joseph Hutcheson, speaking for the Fifth Circuit Court of Appeals in its unanimous opinion in this case where he stated in substance that no matter how one looked at the case, nothing more could be made of it than a mere case of a towing service furnished by G & H and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship. (For the text of Judge Hutcheson's remarks on this subject the Court is referred to Page 4 of this brief where they are quoted in full).

Thus, while it may be true as Petitioner states that it has been held in *Sun Oil Co. v. Dalzell Towing Co.*, supra, and *United States v. Chris Neilson*, 349 U.S. 129, and many other cases that "pilotage" clauses are valid under proper circumstances, it does not follow that a "pilotage" clause will be given effect to enable one party to escape the consequences of his own negligence when it has been found as a matter of fact on competent evidence that *towage and not pilotage* was involved. The proposition that a tower such as is mentioned in the *Bisso* case may not validly contract against liability for its own negligence has long been a part of the judicially created admiralty law. This rule was first established by this Court in 1871 in *The Steamer Syracuse*, 12 Wall 157, 20 L. Ed. 382. There-

after, there were some departures from the rule, notably that of the Second Circuit in *The Oceanica*, 170 F. 893, but when the question was next presented to this Court in 1928 in *The Wash Gray*, 277 U.S. 66, this Court emphatically approved the language and holding of *The Syracuse* and repudiated the holding of *The Oceanica*. In 1955, in the *Bisso* case, this Court again considered a release from liability clause in a towage contract. In the *Bisso* case, the Petitioner's barge, while being towed in the Mississippi River by the Respondent's Tug "Cairo", collided with a bridge pier and sank. At the time, the barge had no propulsion power or steering apparatus; her navigation and maneuvers were in complete control of the Tug "Cairo", her master and crew, whose negligence caused the collision. Consequently, Respondent, owner of the Tug "Cairo", would have been liable to pay Petitioner's damages unless relieved of liability by certain clauses in the contract. One of the clauses in question provided that the towing to be performed should be at the sole risk of the tow, and the second clause provided that the masters, crews, and employees of the Tug "Cairo" and her owners should be in the performance of the service become and be the servants of the tow. This Court held both clauses invalid and stated that the authorities strongly pointed to the existence of a judicial rule, based on public policy invalidating contracts releasing towers from all liability for their negligence. It was further stated that the two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. Referring to the fiction of the release clause

whereby the tower sought to make his own employees the employees of the tow, this Court stated at Page 95, "The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter 'employment' is purely a fiction."

As clearly illustrated by the *Bisso* opinion, the District Court and the Court of Appeals correctly distinguished the *Sun Oil v. Dalzell* case from the case at bar in the following two vital particulars: (1) in *Sun Oil v. Dalzell*, the ship with her own crew was using her own propulsion and rudder power, thereby retaining control of her own movements, and producing a "pilotage" situation; and (2) in *Sun Oil v. Dalzell*, there was no proof of or consideration of a monopoly in favor of the towing company. These two distinctions merit special emphasis here:

> ***Sun Oil v. Dalzell was a true pilotage case, where the ship was using her own propulsion and rudder power, and the towing company, therefore, was merely assisting the ship and did not have complete control of the operation.***

It is, of course, plain from the following language in the *Bisso* opinion (Page 94), that one of the Court's reasons, if not the overriding reason, for invalidating the exculpatory clause in that case was the fact that the vessel in tow had no propulsion or steering power of her own, or, in other words, that it was a towage case:

> " * * * It is one thing to permit a company to exempt itself from liability for the negligence of a

> licensed pilot navigating another company's vessel *on that vessel's own power.* That was the Sun Oil case. It is quite a different thing, however, to permit a towing company to exempt itself by contract from all liability for its own employee's negligent towage of a vessel." (Emphasis supplied)

Similarly, in *Sun Oil v. Dalzell,* supra, relied on by Petitioner, this Court in affirming the Court of Appeals which affirmed the District Court which had found that the ship under her own power and maneuverability was being "assisted" by tugs clearly demonstrated that the fact that the Sun Oil vessel *was* using her own propelling power, and was therefore a pilotage case, was a controlling factor in the result. This Court's opinion therein reads in part as follows:

> " * * * It was not shown that Respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to *furnish tugs to assist her while using her own propelling power.*" (Emphasis supplied)

The distinction in the cases lies in the source of control. In *Sun Oil v. Dalzell,* it was found that the ship, having her own propelling and rudder power, retained control of her own movements, and was merely being assisted by the tugs and pilot, and the pilotage clause was held to be valid because it was in fact a pilotage case. In the instant case, it was found as a fact on competent evidence (Finding of Fact No. 13, R. 882), that the M/V "Har Canaan" had no propulsion or maneuvering power and that her helm was lashed so that she had no rudder or steering power. As the master of the M/V "Har Canaan" was un-

able to command the tug (R. 715), and as his ship had no power or maneuverability, neither he nor his crew attempted to, nor could they, nor did they move the ship forward, backward, or to port or starboard. The facts have been found that the entire navigation, maneuvering and movement of the ship was within the complete control of the towing company through its tugs and its regular employee, Captain Emmett Gray, who, as previously pointed out, were exercising actual control of the navigation and maneuvering at the time of the accident, and who remained the servants of the towing company throughout the entire operation. These facts are clearly distinguishable from those in the *Sun Oil v. Dalzell* case, and all others cited by Petitioner, where the ship was using or had available for use her own maneuvering, propulsion and rudder power, and was directing her own maneuvers and navigation and was merely being assisted by the tugs. The facts in the instant case being very closely akin to those in the *Bisso* case, the result was properly held to be governed by the decision therein.

It is of particular significance that all of the cases cited in Petitioner's brief, which uphold pilotage clauses, are cases of true pilotage, where the vessel being assisted was using, or had available for use, her own propulsion and rudder power; indeed, in all of those cases which we have found where litigation over a so-called pilotage clause has arisen, the clause itself has specified that it applied only when the vessel being assisted was using or had available for use her own propulsion power. In the *Niels Finsen*, (SD NY 1931) 1931 A.M.C. 1014, 52 F. 2d 795, the Court took particular note of this wording in the contract, saying:

> "Does the 'pilotage' change these legal consequences? The purpose of it is, of course, to shield the towing company from liability for the acts of its representative when the latter boards a vessel, *but only, it may be observed, in cases where the vessel is making use of its own propelling power.*" (Emphasis supplied)

The reason for making the distinction between those cases wherein the vessel is making use of her own propulsion and rudder power (pilotage cases) and those wherein she has no propulsion or rudder power (towage cases) is clearly supported by sound public policy; in the one case she has the capacity to extricate herself from situations of peril; in the other case, (as the one at bar), the fate of the vessel in tow is entirely within the control of the towing company through its tugs, their crews, and its so-called dead ship pilot, all of whom are its employees.

The rule of *Sun Oil v. Dalzell*, and similar cases, should be strictly confined to the particular fact situation there involved, as it upholds an exculpatory clause which, historically, are strictly construed by the Courts.

In Sun Oil v. Dalzell there was no proof of the existence of a monopoly in favor of the towing company.

Sun Oil v. Dalzell, as heretofore stated, is distinguishable from the *Bisso* case, and from the instant case by the fact that in the former there was no monopoly involved, whereas in the instant case, as in the *Bisso* case, it was definitely proven that the towing company enjoyed a monopoly. In commenting upon the absence of a monopoly in *Sun Oil v. Dalzell*, this Court said:

> "Respondents had no exclusive privilege or monopoly in respect to the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept any terms of Respondents' pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Evidently, therefore, this Court left open the validity of the clauses in cases where the parties are not on an equal footing or capable of dealing at arm's length. *Sun Oil v. Dalzell* was decided some 23 years prior to the *Bisso* case, and in the latter, when confronted with an exculpatory clause, this Court specifically struck it down as being against public policy, and expressly stated as one of the reasons for the decision that it was "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Mr. Justice Douglas, in his concurring opinion (Page 96) in the *Bisso* case, emphasized the point by quoting with approval the words of Judge Coxe in *The Oceanica, supra,* as follows:

> "It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness, and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. *In both cases the design is to provent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precaution to preserve it.*" (Emphasis supplied)

And again, Mr. Justice Black, speaking for the majority in the *Bisso* case, (Page 91) said:

> " * * * And increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions."

The Trial Court (Finding of Fact No. 10, R. 880) found the following facts with respect to the status of Petitioner, G & H Towing Co., all of which were clearly supported by the evidence: That the only towing companies offering tug service for shifting ocean going vessels in the Port of Galveston at the time in question were Bay-Houston Towing Company, Sudeman & Young Towing Company, and Intracoastal Towing & Transportation Company; that the services which were available to the owners and operators of ocean going vessels in the Port of Galveston from the three "owning companies" were identical; that this came about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G & H Towing Co., Petitioner, an operating company, which was jointly owned by the three "owning companies"; that in carrying out the orders for towing service, G & H Towing Company would use the tugs which were most readily available and convenient without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed; that the contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner; that the contracts offered by the three "owning companies" were identical in terms, and upon a single printed form; that the rates were the same, save for an exclusive contract a ten percent reduction was allowed.

The evidence showed and it was found that any so-called competition between the three "owning companies" in the port of Galveston was purely a fiction. The only towing services available in the Port of Galveston were offered by Petitioner, G & H Towing Co., and they involved the same boats, the same rates, the same crews, the same so-called dead ship pilot, and the same contractual conditions (R. 792, 793, 794, 796, 801, 802). It was, therefore, crystal clear that the three "owning companies" and their wholly owned operating company, G & H Towing Co., effectively monopolized the harbor towing business in the Port of Galveston, and that Maritime Overseas Corporation had no freedom to choose a type of contract without such exculpatory provisions. This was the exact situation which this Court in the *Bisso* case was endeavoring to guard against. The steamship companies regularly doing business in the Port of Galveston were required either to submit to this monopoly, and the harsh terms and conditions it exacted, or do without harbor towing services. The latter they could not do, and the former the District Court, with the subsequent approval of the Court of Appeals, correctly held the prevailing authorities did not compel them to do.

The dropping of an anchor by a vessel without power and maneuverability is not pilotage.

Petitioner attempts here, as it did in the District Court and the Court of Appeals, to distinguish this case from the *Bisso* case by making the contention that the negligent act here was one of pilotage rather than towage. It is, of course, clear that the validity of the exculpatory clause here involved cannot depend upon the nature of the par-

ticular negligent act resulting in the damages, but must depend solely upon the general nature of the overall operation. In this instance, the Court has finally determined, on ample evidence, that the case was one of towage and therefore, any act of negligence committed by any employee of the towing company necessarily was one committed in the course of the towage operation. Moreover, reason does not support the contention that the dropping of an anchor is an act of pilotage rather than towage; barges and non-self propelled vessels which are normally towed in American waters today are equipped with anchors available for use, and certainly there is nothing unusual about a tow being anchored during the course of a towage operation. Anchoring a tow does not change its status as a towed vessel. The mere fact that the anchor was on the tow itself, which in many instances is a requisite to seaworthiness, does not make it any less a part of the overall towing job. The important factor in distinguishing between towage and pilotage is that of the location of control: in the former the tow has no propulsion or rudder power, and her entire navigation and management are under the control of the towing company through the latter's employees; in a pilotage situation the vessel has the use of her own propulsion power and steering gear, thereby retaining control of her own movement, and the towing company merely assists that movement.

Petitioner makes the contention that Maritime Overseas Corp. was not required to sign the contract containing the exculpatory clause in order to obtain tug service in the port of Galveston, Texas. We feel that the findings of the Court on competent evidence against this contention has

put it at rest, it having found that Maritime Overseas Corp. had no freedom of choice in the type of towing contract offered, but was required to accept a contract with such exculpatory provisions if in fact it was to secure the tugs to move its ship (Conclusions of Law, R. 886). This finding was based upon well supported evidence (R. 793). Whether a ten percent reduction was allowed in the rate or not (for signing an exclusive contract), any contract under which petitioner furnished tugs to move a vessel contained the same exculpatory provision, and no other contract was available because Petitioner had a monopoly of the harbor towing business in the Port of Galveston.

Summary of the Applicability of the Bisso Rule, and the Reasons for Distinguishing Sun Oil v. Dalzell.

In summarizing the reasons for applying the rule of the *Bisso* case to the facts found in the case at bar, and distinguishing *Sun Oil v. Dalzell*, and related opinions, we cannot improve upon the words of the District Judge found in his Conclusions of Law (R. 885, 886), where he said:

> "In considering the question of liability over between the various respondents, however, the validity of the so-called 'pilotage clause' (Finding No. 11) is placed at issue.
>
> Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso vs. Inland Waterways Corp.*, 349 U.S. 85, and related opinions immediately following. Respondents G & H Towing and Captain Gray in supporting the

validity of the exculpatory provisions rely primarily on *Sun Oil Co. v. Dalzell Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an employee of the towing company, and such towing company did 'have power to drive hard bargains'.

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) 'it was not shown that Respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power.'; and (b) 'Respondent had no exclusive privilege or monopoly in respect to the service that Petitioner desired to have performed for its tanker. . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

It is, therefore, respectfully submitted that the decisions of the District Court and Court of Appeals, holding under the facts of this case that the so-called pilotage clause did not exculpate Petitioners, are entirely in accord with the settled American maritime law governing in circumstances such as these.

B. The District Court and the Court of Appeals were correct in holding petitioner, G & H Towing Co., liable as the employer of Captain Gray for the latter's negligent acts on the principle of Respondeat Superior.

Petitioner complains in Article II of its argument because the Court of Appeals held it, the towing company, liable as the employer of Captain Gray for the latter's negligent acts. Here again, Petitioner's complaint is predicated upon the contention that Gray was a pilot, and here again this contention must fail because the Court found on competent evidence that he was not a pilot as that term is commonly used and understood in referring to pilots on self propelled vessels being assisted, but merely the towing company employee who was in charge of the overall towing operation (Please see the opinion of the Court of Appeals, 287 F. 2d 852 at P. 854).

The concept that a towing company employee who goes aboard a ship to direct the movement of that ship by one or more of his employer's tugs can remain, throughout the operation, the employee of the towing company so as to bind the latter by his negligent acts, is not a new one. See the *Edward G. Murray* (2 C.C.A. 1922), 278 F. 895. Moreover, as to third parties who are not parties to any contract containing an exculpatory clause, the towing company employee's employment status remains the same even where he is actually performing pilotage service on a ship having the use of her own propulsion and rudder power. See *Publicker Industries, Inc. v. Tugboat Neptune Company, et al.* (3 C.C.A. 1948), 1949 A.M.C. 121, 171 F. 2d 48; *The Niels Finsen*, supra; and *People of the State of California v. The Steamship Jules Fribourg*, (N.D. Cal.),

1956 A.M.C. 939, 140 F. Supp. 333. (The Court's attention is invited to the fact that the Jules Fribourg case supports the District Court's holding that Gray remained the employee of the towing company. That case would not preclude indemnity to Maritime Overseas Corporation against Petitioner. It is distinguishable from the case at bar on the facts in that the Jules Fribourg was found to be using for navigation and maneuvering her own motive and rudder power. In that case there was no finding by the Court that towage was involved. In the case at bar, the ship was without power, self-propulsion, rudder or self maneuverability, and she was being navigated and maneuvered dead. She was entirely under the control of the towing company through its tugs, with its employee in charge, similar to the facts and within the holding of this Court in the *Bisso* case.

The District Court, in fiindings well supported by the evidence affirmed on appeal, correctly held that Emmett Gray, as a matter of fact, was an employee of Petitioner, G & H Towing Company, throughout the entire towing operation. (See Findings of Fact Nos. 12 and 20, R. 881 and 884, respectively). Thus, as between Gray's employer, G & H Towing Company, and the Respondents in this case, G & H Towing Co. was properly held to be liable for the damages resulting from the negligent act of Gray on the principle of Respondeat Superior. Many of the cases cited by Petitioner concern independent pilots (not towing company employees) making personal contracts to pilot ships having the use of their own propulsion machinery and rudders, and are not here in point. Those cases are no more applicable to the one at bar, than are those such as *Sun Oil v. Dalzell*, having to do with towing companies

furnishing a pilot to assisted vessels using their own propulsion and rudder power.

The District Court and the Court of Appeals, were correct in holding that Captain Gray's status as an employee of G & H Towing Co. was not changed by the so-called pilotage clause so as to render Maritime Overseas Corporation personally liable for Gray's negligent acts, because that clause under the facts of this case was void under the holding of the *Bisso* case.

Petitioner argues that Gray, during this towing operation, must have been a pilot because the Court held him liable in accordance with the high standard of care imposed on pilots. We fail to find such a statement in either Court's opinion. The District Court found Gray negligent (Finding of Fact No. 17, R. 883) "in giving the order to drop the anchor when he should have been aware of the construction of the pipelines from general knowledge, the Notices to Mariners and the prominent warning signs which were plainly visible". Nowhere in this finding is there mention of holding Gray to a high standard of care imposed on pilots or of holding him as an insurer. Any captain in charge of a tow is required to know the prevailing conditions in the waters where his job is performed, and the standard of care imposed on Gray (which was no more than *due* care) was entirely consistent with the circumstances that Gray had been employed by G & H Towing Company in Galveston for 21 years preceding the casualty in question (R. 158), that he had been Port Captain for Petitioner, G & H Towing Company, located in Galveston, since March of 1958, and that in that capacity, as part of his regular job, he was in charge of all dead ship towage operations of G & H Towing Company. Furthermore, in affirming the District Court's find-

ing of Gray's negligence, the Court of Appeals said (287 F. 2d 852, at P. 854):

> "We are holding, though, that it was entirely proper for the District Judge to find, as he did, upon the whole facts, that the proximate cause of the injury sued for was *the failure of Gray to use due care* to find out just where the pipelines were, etc." (Emphasis supplied)

Thus, it was expressly shown that the standard of care required of Gray was only *due* care, and no higher standard, such as that imposed upon a pilot or an insurer, was required of him. Moreover, even if a higher standard of care had been imposed upon Gray by the Court, it could not have changed the nature of the work which he was performing in this instance from towage to pilotage.

The District Court and Court of Appeals have held that this was not a case where the master of the ship should have interfered with one furnished as being competent, in charge of her navigation. As a matter of fact, *the District Court found that Gray gave the order to drop the anchor* and that the master was not negligent for failing to intervene and these findings were approved by the Court of Appeals (Findings of Fact Nos. 21 and 22, R. 884). The pipeline area could have been known only to Captain Gray, certainly not to the ship's master who was a stranger in the port. The master had no knowledge and did not purport to have knowledge of local waters (R. 695). He did not and could not command the tugs as he was not familiar with the signals by which they could be and were directed (R. 715). There was no evidence that Captain Gray, before the accident, having been furnished for this purpose by a

large towing concern, did not know what he was to do, and certainly there was no prior apparent evidence of his misconduct or incompetence. He, not the master or crew of the ship, knew or should have known the port. There was no evidence that the master should have acted differently than he did and the Court so found. Whether or not the master should have intervened and superseded Gray was strictly a question of fact, and one which has been determined on ample evidence contrary to Petitioner's contention.

As was said in the *Caspian* (E.D. Pa. 1925) 14 F. 2d 1006, aff'd. 14 F. 2d 1013, "the test of employment is selection and control". In the case at bar, Emmett Gray had been an employee of Appellant, G & H Towing Co., for twenty-one years. At the time of the casualty, he was employed by G & H Towing Co. as Port Captain. His salary and all moneys which he received for acting as a so-called dead ship pilot were paid to him by G & H Towing Co. (R. 240). He received this towing assignment as well as all other towing assignments from G & H Towing Co., including the names of the ships to be moved, the points from and to which they were to be moved, and the times of the movements (R. 823, 824). This entire movement of the "Har Canaan" was within the sole control of G & H Towing Co. who furnished all propulsion, motive and directional and maneuvering power in the form of the three tugs positioned and navigated solely under the direction of its employee, Captain Emmett Gray. Gray was unknown to, and his services were not requested by Maritime Overseas Corporation, and it did not exercise or attempt to exercise any control over his or the tugs' actions. Under the circumstances, the contention of Petitioner, G & H Towing Co. that Captain Gray

was not its employee, but that of Maritime Overseas Corporation is untenable. The record is replete with competent evidence to the contrary, and the District Court's finding to the contrary, concurred in by the Court of Appeals, forecloses the question.

C. Captain Gray was not a borrowed or loaned servant.

G & H Towing Co., in its petition, Argument, Article III, makes the contention that Gray, while aboard the M/V "Har Canaan", was a borrowed or loaned servant. It is not clear from the petition whether Petitioner is contending that Gray was the borrowed servant of Bay-Houston Towing Company or Maritime Overseas Corporation. In any event, the contention made in this part of the petition that Captain Gray was a borrowed or loaned servant is the same contention, stated in different words, made in other parts of the petition that he was acting as a pilot assisting a self propelled and self manned and maneuvered vessel, and as that contention was decided by the District Court, and affirmed by the Court of Appeals, contrary to Petitioner's position, and was well supported by the evidence, it should be settled so far as this Court is concerned. There is no substance to Petitioner's argument that because the tugs and their owners, as distinguished from their operator (G & H Towing Co.) were dismissed from this action, Gray thereby should be found to have been the borrowed servant of Maritime Overseas Corporation. As a practical matter, Bay-Houston Towing Co., one of the tug owners, and the only company which had the contract with Maritime Overseas Corporation, was never able to perform any towing services under that contract because it did not operate any tug-

boats (Finding of Fact No. 10, R. 880). As G & H Towing Company was the only operator of harbor tugs in the Port of Galveston, and as it automatically supplied Captain Gray to be in charge of the towing operation when it received a request to move a dead ship (R. 726), then in order to get its ship moved within the harbor of Galveston, Maritime Overseas Corporation was obliged to accept Captain Gray along with the tugs. The Galveston Pilots Association, the membership of which was composed entirely of Federal and State licensed pilots, compulsory by state law for ships under registry, did not supply pilots to direct towage operations such as was here involved (R. 823), for the simple and obvious reason that this is a towage service.

All of the cases cited by Petitioner for the proposition that Gray was a loaned or borrowed servant, including *Sun Oil v. Dalzell*, involved true pilotage, i.e., where the ship had the use of her own propulsion and rudder power and was only being assisted by tugs or had no tugs at all, and accordingly, are not in point here. The Court's attention is invited to the fact that in this section of its petition Petitioner has stated, apparently as a fact, that the movements of the M/V "Har Canaan" on the occasion in question were in direct charge of her master, when the record clearly shows that the master did not and could not command the tugs at all (R. 715), and, therefore, could not and did not move the ship in any direction, that Captain Gray had assumed the conning of the vessel (Finding of Fact No. 13, R. 882), and that Captain Gray, not the master, ordered the anchor dropped (Finding of Fact No. 14, R. 882). Finally, the question was entirely foreclosed by the trial judge in his Finding of Fact No. 20 (R. 884), amply supported by the evidence, that "Cap-

tain Gray was acting within the scope and course of his employment by G & H Towing Co. at all times material hereto, and was not a loaned servant to the vessel or her operators at such times."

II.

The Opinion of the Court of Appeals is not in Conflict With that of Any Other Court of Appeals or of this Court in Any Other Case.

Clearly, the opinion of the Court of Appeals in this case is entirely in conformity with the prevailing law as announced by Your Honors in *Bisso v. Inland Waterways Corp.*, the case having been determined on competent evidence as a matter of fact to be one involving towage. The decision is not in conflict with that in *Sun Oil Co. v. Dalzell*, or the cases following it, because those cases involve, as a matter of fact, pilots on vessels being assisted while under their own propulsion power and maneuverability, and not towage. Indeed, there is a marked uniformity in the authorities throughout the country whereby an exculpatory clause, that is a clause purporting to release a party from liability for damages for its own negligence, is held to be invalid as against public policy when towage is involved. This case, having been determined to be one of towage, falls under that line of authority in which the exculpatory clause is held invalid.

However, if this Court should believe that there are facts present in this case which render it substantially distinguishable from the *Bisso* case, and yet do not bring it within the purview of the rule announced in *Sun Oil v. Dalzell*, then it is respectfully submitted that it would be a novel case, and that the law governing in such situation has been determined by the Fifth Circuit Court of

Appeals by its opinion in this case. That opinion, in view of its novelty, would not be in conflict with any other decision of any other Circuit Court of Appeals or of this Court. Accordingly, for this reason, the writ should be refused.

III.

No Public Interest of Importance is here Involved.

Petitioner is endeavoring to have a clause, sometimes held exculpatory in true *pilotage* situations, declared to be effective to relieve a towing company for negligent *towage*. We have been unable to find a case where this was done and Petitioner has cited none. Indeed, in almost all cases now on record, where litigation involving such a pilotage clause has arisen, the clause itself has provided that it is effective when the vessel being assisted had the use of her own propulsion power, or in other words, what we refer to as pilotage cases. Certainly the clause here asserted by Petitioner to be involved is not in wide use, if indeed it is in use in any port except Galveston, Texas. The circumstances that the engines and rudder of the "Har Canaan" were inoperative, combined with the occurrence of a rather freakish accident (the breaking of a poorly marked submarine pipeline by a ship's anchor), occurring in a harbor where a monopoly of harbor towing business existed in favor of a single towing company, gave rise to the issues of cross-liabilities and indemnity in this litigation. The unusual circumstances which gave rise to these issues are not likely to occur with frequency, and would concern only a small segment of the marine industry in isolated instances. Certainly there are no issues here involved which would be of importance to the general American public.

IV.

Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings amply supported by the evidence, and not clearly erroneous, there are no questions to be passed on by this Court.

The law is clear that on a question of fact this Court will accept the concurrent findings of the District Court and Circuit Court of Appeals supported by substantial evidence. *The "Linseed King"* (N.Y. 1932), 285 U.S. 504; *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, (Ind. 1959) 336 U.S. 271; *Alabama Power Co. v. Ickes* (1938) 302 U.S. 464.

At the risk of being burdensomely repetitious, it is again respectfully pointed out to the Court that the District Court, on well supporting evidence, found, as a matter of fact, that the situation here involved was one of towage, rather than pilotage, and that the exculpatory clause was inapplicable under the facts as they found them. These fact findings were specifically approved by the Court of Appeals. The District Court applied the well settled law, as announced by Your Honors in *Bisso v. Inland Waterways Corp.*, supra, that a tower cannot effectively release himself from liability for negligence of his own employees. The Court of Appeals approved the fact findings and this application of the settled law. This effectively disposes of, and indeed precludes, under the authorities cited above, any further consideration by this Court of the points which Petitioner attempts to raise in this petition.

Conclusion

Maritime Oveaseas Corporation respectfully submits that the judgment of the Court of Appeals, and the judgment of The District Court, are correct; that their holdings are not in conflict with, nor are they in any way contrary to, any prior decision of other Courts of Appeal or of this Court, but are in conformity with such decisions; that the decisions of the District Court and of the Court of Appeals in this case are the result of the application of well settled legal principles to findings of fact amply supported by the evidence; that the case involves no matters of general public interest of importance, and that the decisions are not contrary to any precedents or public interest that require their correction by the exercise of this Court's power of supervision.

Respectfully submitted,

EASTHAM, WATSON,
DALE & FORNEY

CLARENCE S. EASTHAM

By_____

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Houston 2, Texas
Attorneys for Maritime Overseas Corporation

Of Counsel:

CLARENCE S. EASTHAM
ALAN S. DALE

Certificate

I certify that a copy of the foregoing Brief of Maritime Overseas Corporation in opposition to the Petition for Writ of Certiorari of G & H Towing Company, has been mailed to Mr. Robert Eikel, 1910 Tennessee Building, Houston 2, Texas, Attorney for Petitioner, G & H Towing Company and Petitioner, Emmett Gray, Royston, Rayzor & Cook, Cotton Exchange Building, Galveston, Texas, Attorneys for Petitioner, G & H Towing Company, and to McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, Attorneys for Respondents, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corp., and Pelican Island Development Corporation, this 22nd day of August, 1961.

CLARENCE S. EASTHAM

CLARENCE S. EASTHAM

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Supreme Cour

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EDWIN E. JOHANS
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PETITION

Of Petition for Writ o
Court of Appe

To the Honorable the
of the Supreme Court

G. & H. Towing C
fully petitions this Hon
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October 9, 1961, denyin

NO. 277

IN THE

t of the United States

BER TERM, 1961

OWING COMPANY,

Petitioner

-versus-

SON, KANSAS CITY BRIDGE
PMAN & SCOTT CORP., AND
DEVELOPMENT CORP., AND
ERSEAS CORPORATION,

Respondents

FOR REHEARING

f Certiorari to the United States
eals for the Fifth Circuit

Chief Justice and Associate Justices
of the United States:

ompany, petitioner herein, respect-
orable Court for a rehearing herein
lonorable Court entered herein on
g its petition for a writ of certiorari

to issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, and would respectfully show that there exist substantial grounds therefor although not previously presented, as follows:

GROUNDS FOR ALLOWING REHEARING AND GRANT OF PETITION

The courts below have wrongfully held liable petitioner G. & H. Towing Company as the corporate tortfeasor which moved the vessel and liable as the master for the negligence of the pilot, found to be its servant in charge of the vessel movement, directly contrary to the clear and undisputed evidence that another and entirely separate corporation, Bay-Houston Towing Company, contracted to move the vessel (*i.e.*, to furnish tugs and a pilot to move the vessel), and did furnish under that contract the tugs and the pilot, and hence was the only corporation that could lawfully be found liable for the negligence of the pilot, its servant. That this pilot was in the general employment of and secured from or "borrowed" from petitioner is immaterial, because petitioner did not agree to move the vessel, did not have and had no authority to direct such movement or the pilot in charge of the towing operation. The pilot at the time was assisting in performing the Bay-Houston Towing Company contract, not petitioner's, and hence was subject to the orders of Bay-Houston Towing Company and was that contracting corporation's servant. Holding petitioner as the tortfeasor, when it never engaged to move the vessel nor agreed to perform the other corporation's contract to move the vessel, is contrary to the settled law and clearly erroneous and in direct conflict with decision of other Courts of Appeal,

namely in the cases of *Parks Steamship Co. v. Cities Service Oil Co.*, 2 Cir., 1951, 188 F. 2d 804, cert. den. 342 U.S. 862, and *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and the writ should be granted to correct such fundamental error.

STATEMENT

Bay-Houston Towing Company made a written contract with respondent Maritime Overseas Corporation to furnish in certain named Texas ports all harbor tug service it would require, and at Galveston-Texas City to furnish pilotage for shifting vessels not having their own power. This contract was an exclusive one, obligating Maritime Overseas Corporation to obtain *all* such services it required *only* from Bay-Houston Towing Company. An exact copy, except for signatures, is reproduced as Appendix IV below.

The M/V HAR CANAAN, operated by respondent Maritime Overseas Corporation, did not have the use of her engines, and her agents desired that she be shifted within the confines of Galveston harbor. To perform its contractual undertakings and in strict conformity with the contract, Bay-Houston Towing Company caused the ship to be shifted by three tugs, only one of which it itself owned, and a "dead-ship" pilot, Emmett Gray. For all of these services Bay-Houston Towing Company rendered its bills to respondent Maritime Overseas Corporation and was paid in accordance with the contract. The amounts so billed and paid of course included tug hire and pilotage charges. The evidence establishing these facts is clear and complete, including copies of the bills so rendered and paid.

In the harbor movement of the ship so performed in accordance with the Bay-Houston Towing Company con-

tract, the M/V HAR CANAAN's anchor was dropped on and damaged a pipe line, and the trial court found the damage caused by the pilot's negligence.

The tugs so furnished to the ship under the contract with Bay-Houston Towing Company were actually operated by a separate and distinct corporation, petitioner G. & H. Towing Company, being chartered by it from the tugs' owners and manned and operated by it. The pilot, Emmett Gray, was in its general employment as its port captain. But G. & H. Towing Company was *not* a party to the contract between Bay-Houston Towing Company and Maritime Overseas Corporation, and it at no time agreed with Maritime Overseas Corporation to furnish tugs to the ship or to perform pilotage, having no contractual relations whatsoever with Maritime Overseas Corporation. Its contractual relations and agreements were *only* with Bay-Houston Towing Company (as well as with two other separate and independent tug-owning corporations).

Under its agreements with Bay-Houston Towing Company, petitioner was paid by Bay-Houston Towing Company (*not* by Maritime Overseas Corporation, to whom it rendered no bills nor presented any claims) a percentage of the amounts (both for tug hire and pilotage) contracted to be and actually paid to Bay-Houston Towing Company by respondent Maritime Overseas Corporation. Out of the portion paid to it by Bay-Houston Towing Company for the pilot's services, G. & H. Towing Company paid the pilot a percentage.

The libel *in personam* against the contracting towing company, Bay-Houston Towing Company, was dismissed by the trial court, and no appeal from that decree taken.

There was no evidence of fault in the operation of the tugs, and the trial court dismissed all claims against them *in rem*, and neither petitioner as operator of the tugs, nor Bay-Houston Towing Company, nor Suderman & Young Towing Company (the owner of two of the tugs) was held liable. No appeal was taken from these portions of the decree.

The vessel, held liable *in rem*, was allowed indemnity.

The pilot Gray was held personally liable and petitioner was held liable as his principal, by the trial court. The trial court decides that "Gray was acting within the scope and course of his employment by *G. & H. Towing Company* and was not a loaned servant *to the vessel or her operators.*" The Court of Appeals particularly states that Gray "was merely the person in direct command with respect to a dead ship towing operation," that this "is a mere case of towing service *furnished by G. & H. Towing Company* and performed by its port captain." (Italics ours.)

The decisions of the courts below holding petitioner liable have thus been based simply upon the principle of *respondeat superior*. It is urged respectfully yet with all earnestness that if these decisions are thus correctly decided on the principle of *respondeat superior*, they are plainly under the facts and the law wrongfully decided in that another corporate "superior" should have been held, namely Bay-Houston Towing Company, and not petitioner.

ARGUMENT

There is not one scintilla of evidence that petitioner made any agreement with respondent Maritime Overseas Cor-

poration to move its vessels, or to furnish pilotage to it or its vessel. The only evidence, which is ample and undisputed, is that Bay-Houston Towing Company contracted and agreed with Maritime Overseas Corporation to furnish tug power and dead-ship pilotage, that is to say, using the language of the Court of Appeals, it agreed to perform the towing operation of shifting the dead ship within the harbor, and it (*not* petitioner G. & H. Towing Company) furnished the towing service performed by Captain Gray and the tugs. A determination that Captain Gray was *not* loaned by G. & H. Towing Company to the vessel is of course lawfully no determination that he was not the servant of Bay-Houston Towing Company. Petitioner would respectfully show that since it was Bay-Houston Towing Company which furnished his services to the respondent Maritime Overseas Corporation and the vessel strictly in compliance with its contract, Bay-Houston Towing Company was of course his employer and the master responsible for any of his acts as its servant, he being "loaned" to *Bay-Houston Towing Company* as its servant by petitioner G. & H. Towing Company, his general employer.

It hardly need be pointed out that the contract between Bay-Houston Towing Company and the vessel operator Maritime Overseas Corporation *in no place even mentions petitioner*. It expressly permits Bay-Houston Towing Company to use its own tugs and agents or the tugs of others. And it has no limiting words obligating it to use any particular personnel in performing the work of "Pilotage—Shifting Vessels Without Own Power."

There can be no doubt at all that Bay-Houston Towing Company could comply fully with its contractual obliga-

tions by engaging for the M/V HAR CANAAN any pilot whomsoever who had been licensed by the federal government to act as pilot in Galveston harbor waters. That it actually did engage an employee of petitioner who was so licensed is of no legal moment in determining whose employee pilot Gray was *at the time he was acting aboard the vessel.*

The leading case determining the test of responsibility for the actions of a servant whose general employer is a different company from the one whose work he was performing at the time of the casualty is of course the decision in *Denton v. Yazoo & Mississippi Valley Railroad Co.*, 1931, 284 U.S. 305, where the rule is thus clearly phrased:

> "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former."

What service could be more particular than having supervision of the towing operation here, which Bay-Houston Towing Company, *not* petitioner, agreed by its contract to perform and which the courts below have expressly held was being performed for respondent Maritime Overseas Corporation at the time of the casualty?

In *Jones v. George F. Getty Oil Co.*, 10 Cir., 1937, 92 F. 2d 255, cert. den. 303 U.S. 644, certiorari was denied and therefore there is certainly no disapproval of stating the rule governing in such cases as the instant one thus:

> "The ultimate test is: Whose is the work being done . . . The identity of the person who, in fact, directs the details of the work and gives the immediate in-

> structions to the workmen is of comparatively small importance, the power of control referred to being the power to control the undertaking as a whole."

In *Fries v. United States*, 6 Cir., 1948, 170 F. 2d 726, where again Your Honors refused certiorari, 336 U.S. 954, the United States had in its employment the negligent servant and had an interest in the performance of the work being done at the time of the casualty, and the Court of Appeals nevertheless held him the servant of the special employer alone because he had been furnished to that employer to do that employer's work.

Nor can it be rightfully contended here that Bay-Houston Towing Company is not responsible for the pilot Gray's actions because Gray received part of the sum paid Bay-Houston Towing Company by respondent Maritime Overseas Corporation for his services.

This is plainly shown by the decision in *Ellis v. Dannen Grain & Milling Co., Inc.*, 7 Cir., 1960, 275 F. 2d 352, where the negligent driver normally drove a truck for a concern that hauled grain from the mill. On the occasion of the casualty, he was using his own car to get machinery parts for the mill. The mill was held responsible, the Court of Appeals saying:

> "A servant who is employed by one person may with his consent be loaned to a third person to render a special service and thereby become the servant or employee of the third person in the performance of such special service."

Petitioner urges finally that the decisions below holding it (and not Bay-Houston Towing Company) responsible

are directly in conflict with the following cases in other circuits:

Parks Steamship Co. v. Cities Service Oil Co., 2 Cir., 1951, 188 F. 2d 804, cert. den. 342 U.S. 862, is a case strikingly like the instant one. In that case the district court found that the ship had employed and was responsible for the pilot who anchored her in a foul berth. The charter party provided however that the *charterer* (*not* the owner) would provide a safe anchorage, and therefore the Court of Appeals held that the pilot was the *charterer's* servant for whose negligence the charterer was responsible under the agreement, even though he had actually been engaged by the ship's agent. The Court of Appeals so holds, at page 806:

> "The district court found that pilot Cleverly was employed by the libellant and not by the charterer. But this finding is immaterial to the decision if, as we hold, the charterer had the duty to procure a specific anchorage within Hingham Bay. Having covenanted that it would be a 'safe place,' the respondent was responsible for the conduct of Cleverly as a 'borrowed servant.' Although in the libellant's employ, the pilot was performing a service for which the charterer was responsible."

What more apt words could here be used to establish the responsibility of Bay-Houston Towing Company rather than that of petitioner for the pilot's acts?

The other case with which the decisions below are also clearly in conflict is *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, where the *charterer who furnished to the vessel* owner the negligent pilot (a tugboat captain employed by the towing

company) was held required to indemnify the vessel owner. Quoted with approval was the following language from the decision in *The West Eldara*, 2 Cir., 104 F. 2d 670, cert. den. 308 U.S. 607:

> "On the contrary, . . . one who is under contract to dock or undock a vessel is responsible as principal to the owner of the ship for the negligence of the agent whom the contractor places on the ship in charge of the operations."

CONCLUSION

Petitioner respectfully submits that there can be no other result here if the settled law be followed in the circumstances of the instant case than that petitioner G. & H. Towing Company be found not responsible for nor liable for the actions of the pilot Emmett Gray while directing the towing operation which Bay-Houston Towing Company had solemnly contracted with the vessel's operators to perform and in the performance of whose contract Gray was then acting and which company was then his master under the doctrine of *repondeat superior.*

Respectfully submitted,

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By Robert Eikel
Attorneys for Petitioner

ROBERT EIKEL,
Of Counsel

CERTIFICATE (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered October 9, 1961, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

Robert Eikel

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that service of the within petition was made upon Armstrong, Bedford & Lambdin, 201 National Hotels Building, Galveston, Texas, and McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, attorneys for respondents other than Maritime Overseas Corporation, and Eastham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, attorneys for respondent Maritime Overseas Corporation, claimant of the M/V HAR CANAAN, by placing copies thereof properly addressed to each of them in the United States mail with adequate postage affixed thereto.

Robert Eikel

Robert Eikel

APPENDIX I.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18619

EMMETT GRAY, G & H TOWING COMPANY and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

Appeal from the United States District Court for the Southern District of Texas

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(March 15, 1961)

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

HUTCHESON, Circuit Judge: This appeal is from findings and a judgment in admiralty in favor of the libellants, in a suit brought by them as owners of pipe lines, for damages resulting from their negligence destruction in the course of shifting the M/V Har Canaan as a dead ship to a slip in Galveston Harbor.

A great deal of testimony was taken on the issue of fault, and the district judge made full findings in effect that the destruction of the pipe lines was due to the negligence of the respondent, Emmett Gray, port captain for G & H Towing Co., who was furnished by it as a pilot for the dead ship movement.

Based on these findings, the court adjudged: (1) Gray liable; (2) the Har Canaan liable in rem; (3) Maritime Overseas, owner of the Har Canaan, not liable in personam; and (4) G & H Towing Co., the employer and furnisher for the movement of Emmett Gray, its port captain liable in personam. He als denied and awarded indemnity as follows:

> "Thus, as to the liability over between the several respondents, the following conclusions are made.
>
> "6. G & H Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the Har Canaan, for any payment they may be required to make under the decree to be entered herein.
>
> "7. Maritime Overseas Corporation, as claimant of the Har Canaan, is entitled to indemnity from Captain Emmett Gray, individually, and from G & H Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G & H Towing Company to Maritime Overseas will be joint and several."

Gray, as the respondent held primarily liable, here insisting that the findings and conclusions, that he was negligent in handling the ship so as to cause injury to the pipe lines, are clearly erroneous, launches massive attacks upon the findings, that he was negligent, and urges upon

us that the cause of the injury to the pipe lines was negligence not on his part but on the part of the pipe line owners in not properly laying and maintaining the lines in place and in not clearly and properly marking their location.

The other appellants join him in this attack and argue mightily that the district judge has misconceived what actually occurred and that the findings of negligence are against the truth and right of the case.

The G & H Towing Company, in addition to its attack upon the negligence findings of the court, strongly attacks the court's conclusion, that the clause in its contract providing in effect that it would not be liable for the acts of pilots furnished by it would not avail it, as an erroneous conclusion of law, and urges that, because of that clause, Gray's negligence would not be imputed to it, and it could not, therefore, be held liable for it.

The Har Canaan and Maritime Overseas Corporation, its owner, argue vigorously that they were not responsible and cannot be held liable for the negligence of the pilot. Each of these argues that the conclusions on indemnity are wrong.

For the reasons hereafter stated, we are of the opinion: that the district judge was right throughout in his findings of fact and in his conclusions of law, that Gray was guilty of negligence in causing the anchor to be dropped upon the pipe line, and that, as a result of his negligence, he and the other respondents found liable are liable to the pipe line owners for the damage done them; and that the right of exoneration, action over, or indemnity is as he concluded it to be.

Taking up first the primary question of whether the findings of fact as to fault should be set aside, we think

it sufficient to briefly say that the matter of fault or negligence is a disputed issue, and that, on the record as a whole, there was ample evidence for the district judge to find, as he did: that Gray and, therefore, the Har Canaan and its owners, and the G & H Towing Company knew that the pipe lines were laid in the slip under permit; that the burden was heavily upon them to show, in defense of their act in dropping the anchor, that they had made proper inquiries as to just where they were laid; and that due care had been used in dropping the anchor to avoid striking and injuring them in the course of the ship's movement; that, in short, Gray and the other respondents could not shift liability for the affirmative acts causing injury to the pipe line as a result of dropping the anchor on the lines by complaining here that, as matter of law, the pipe line owners were at fault in not marking more precisely the position of the lines, or that the findings that they were not are clearly erroneous.

In declaring these views, we are not holding that the district judge could not have found the fault and responsibility as these contend he should have. We are holding, though, that it was entirely proper for the district judge to find, as he did, upon the whole facts, that the proximate cause of the injury sued for was the failure of Gray to use due care to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines, he dropped the anchor on them with damaging results.

With the highly important question of primary fault for the injury thus disposed of by our holding that the court's findings as to Gray's negligence are not clearly erroneous and must be approved, we turn to the other questions raised by the several appellants.

The first of these is the complaint of all the appellants, including Gray, that the district judge erred in refusing to give effect to the pilotage clause[1] in the towing contract, providing in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, its employee, indeed its port captain.

Of this, we think it sufficient to say that we agree with the district judge's conclusion that the libellants, strangers to the contract, cannot, of course, be held bound, or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that appellants are bound and precluded by the decision and holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, that such a clause is invalid. In addition, we think it clear that respondents' reliance on *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, will not at all do there, both because of the decision in the Bisso case, which, on full consideration, rejected the Dalzell case as authority for the position here taken, and because the Dalzell case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in the case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation

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1 "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel, or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for (sic) any act, omission or order of said pilot."

who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the Bisso case, and the judgment denying effect to the invoked clause of the contract must be affirmed.

We are also of the opinion that there is no merit whatever in Gray's claim that he is protected from liability for his own fault by the terms of the contract, even if it were otherwise regarded as valid. Neither is there any merit in the claim of Maritime Overseas Corporation and Har Canaan, that they are not liable for Gray's acts because, under the law governing pilotage, they could not be held liable for the pilot's negligence. We find nothing in the cases cited by them, nothing in the cases generally, which supports this claim. Indeed, we think the cases have settled the law to the contrary, even in a case of true involuntary or compulsory pilotage. Cf. *Publicker Industries, Inc. v. Tug Boat "Neptune" Company et al*, 171 F.(2) 48; *United States v. Chris Nielson*, 349 U.S. 129. We are, therefore, of the clear opinion that the court's findings of fact as to fault in the injury to the pipe lines cannot be set aside as clearly erroneous; that his conclusions, that the respondents held liable were in fact and in law responsible to the libelants, are correct and may not be set aside; and that all questions as to actions over for exoneration and/or indemnity were correctly decided, and the decree is in all things AFFIRMED.

APPENDIX II.

No. 18619

JUDGMENT (OF THE COURT OF APPEALS)

Extract from the Minutes of March 15, 1961

EMMETT GRAY, G. & H. TOWING COMPANY, and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Emmett Gray and G. & H. Towing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (OF THE UNITED STATES DISTRICT COURT)

STATEMENT OF THE CASE

This proceeding is brought in rem against the Israeli vessel HAR CANAAN, claimed by Maritime Overseas Corporation; in rem against the Tug J. R. GUYTON, owned by Bay-Houston Towing Company; in rem against the Tugs JUNO and ALBATROSS, owned by Suderman & Young Towing Company; and in personam against Bay-Houston Towing Company; Suderman & Young Towing Company, and G. & H. Towing Company, the charterer and operator of the three tugs named, and Emmett Gray, an individual, employed as Port Captain by G. & H. Towing Company. The Libellants are Pelican Island Development Corporation, the owner of the pipeline work which was damaged in this casualty; Merritt-Chapman & Scott Corporation, general construction contractor for the Pelican Corporation; Edwin E. Johansson, sub-contractor under Merritt-Chapman & Scott for construction of water and sewer pipelines between Galveston Island and Pelican Island; and Kansas City Bridge Company, sub-contractor under Johansson for the cross channel portion of this construction which was immediately involved. By impleading petition of cross-libel, Maritime Overseas Corporation asks indemnification from the Tugs J. R. GUYTON, JUNO, and ALBATROSS, and from all the named respondents, for any recovery libellants may obtain against the HAR CANAAN or her claimant, and by impleading petition or cross-libel, those same respondents jointly and severally ask indemnification from Maritime Overseas Corporation for any recovery libellants may obtain against them.

A trial having been had on the issues of liability alone, and having received and considered the evidence and the briefs and arguments of the proctors for the respective parties, these Findings and Conclusions are made by me pursuant to Admiralty Rule 46½.

FINDINGS OF FACT

1. The channel between Galveston Island and Pelican Island is a part of the Galveston harbor. Slip A is immediately west of Pier 41 on the Galveston Island or southerly side of this channel. The width of the channel at this point is approximately 1400 feet, and the channel at this point is dredged to a depth of approximately 35 feet between the harbor lines, a distance of 1125 feet.

2. On April 12, 1956, a permit was issued to libellants through the office of the United States Corps of Engineers for the construction of water and sewer mains, each approximately 12 inches in diameter, to be laid in a trench across the Galveston channel, and at a depth not less than 50 feet below mean low water. By amendment of the permit on December 16, 1957, the center line for this crossing, at the southerly or Galveston Island end, was established at a point which the evidence shows to be approximately 18 feet eastward from the northeast corner of Slip A, and the line of bearing for the crossing from that point was N 10° 23′ 25″, or almost directly across the channel to a point opposite on Pelican Island.

3. Acting under this permit, as originally issued and so amended, Merritt-Chapman, as general contractor for the Pelican Corporation, contracted with Johansson for the construction of these pipelines, and Johansson in turn subcontracted to Kansas City Bridge Company that part of the work which involved laying the sub-aqueous lines. A

trench was dredged across the channel to the necessary depth of 51½ feet, which was approximately 16 feet deeper than the normal depth of the channel between the harbor lines. The dredged trench followed the center line of the crossing as established by the amended permit, and extended about 50 feet to either side of that centerline. This portion of the work was completed prior to November 27, 1957, and soundings of the trench were made by the United States Corps of Engineers on that date. Late in 1957, Kansas City Bridge Company began receiving sections of the steel pipe to be laid at a job site at the Pelican Island end of the crossing, and for sometime thereafter was engaged in welding short sections of this pipe into 400 foot lengths, testing the welds, and covering this pipe with a protective wrapping. Meanwhile, in December, 1957, and January, 1958, a large "whirley" or crane barge was used to dredge the ends of the trench outside of the harbor lines. A cavein of the bulkhead at the northeast corner of Slip A, caused by this dredging, was repaired in December, 1957. In January, 1958, a bulldozer was used to cut a 400 foot ditch on Pelican Island into which the long sections of pipe could be placed preparatory to their being drawn into the water.

4. On January 27, 1958, pulling cables were stretched across the channel, and the leading section of each pipeline was hung below a barge at the Pelican Island end. On the ensuing four days, the two pipelines were drawn behind this barge and laid in the trench across the channel which had been dug to receive them. On January 31, 1958, the channel was cleared again for marine traffic. Between February 6 and February 25, 1958, the whirley barge was employed as riser sections were welded to the two pipelines, first at the Galveston Island end, then the Pelican Island end. Between February 27 and March 4, 1958, divers were used to walk the pipelines and ascertain their position

and alignment. The whirley barge was used to uncross the lines at one point in mid-channel during this work. On March 5, the lines were filled with water for hydrostatic pressure tests, and they remained filled with water until the later casualty.

5. The remaining work on the pipelines prior to the casualty in suit, which occurred on March 21, 1958, was concerned with the construction of a thrust block over the risers at the Galveston Island end, just east of the entrance to Slip A, and immediately in front of the bulkhead between Slip A and Pier 41. Sleeves were welded around the risers where they passed through the bulkhead, a wooden form was constructed for the thrust-block, and this was lowered into place over the risers after the ground had been cleared by a diver. On the morning of March 21, and at the time of the casualty, concrete was being poured for this thrust-block. A diver was then below directing this work, and his tenders were on the deck of the whirley barge which lay at the northeasterly corner of Slip A, and partly into that Slip. The crane of the whirley barge extended over the work area. On the channel side of the bulkhead, a small "sea mule" and a larger flat barge were immediately above and adjacent to the work area, and personnel employed by Kansas City Bridge Company were on these work boats as well as upon the bulkhead.

6. In addition to the physical evidence already related showing the construction and placement of these pipelines across the channel, and to the notice thereof contained in the permit issued by the United States Corps of Engineers, at least three "Notices to Mariners" had been issued by the Corps of Engineers, on November 15, 1957, December 23, 1957, and January 16, 1958 advising of this construction. On December 30, 1957, double signboards, measuring

7 feet 10 inches, by 16 feet, on each face, and bearing large letters reading "WARNING—PIPE CROSSING—DO NOT DRAG ANCHOR" were placed on either side of the channel, the sign on the Galveston side being centered about 31 feet east of the center line established for the crossing, and the sign on the Pelican side being centered about 115 feet east of this center line. The legend of either sign was easily visible to any ship proceeding up or down the channel.

7. The Israeli ship HAR CANAAN is a dry-cargo vessel of 10,311 gross tons. Her length is 515 feet 2 inches, and her beam is 66 feet 7 inches. She carried two anchors forward, each weighing approximately 8900 pounds. At the time of this casualty the ship was light and drawing approximately 10 feet. Her forecastle deck was approximately 40 feet above the water line, her bridge deck was approximately 60 feet above the water line, and the horizontal distance from the hawse-pipes in the bow of the ship to the bridge was about 200 feet.

8. On the morning of March 21, 1958, the HAR CANAAN was fully manned, equipped and seaworthy excepting that her main engines were shut down for repairs. Her agents at Galveston, Strachan Shipping Company, gave an order to Bay-Houston Towing Company to furnish three tugs and a pilot to move the HAR CANAAN as a "dead" ship from Pier 15, where she was then lying, to Sunset Grain Elevator at the inner end of Slip A. The distance between these points was approximately two miles.

9. Bay-Houston Towing Company held a contract with Maritime Overseas Corporation, operator of the HAR CANAAN, to move its vessel on stated rates and terms.

10. The only towing companies offering tug service for shifting ocean going vessels in the port of Galveston at

the time in question were Bay-Houston Towing Company, Suderman & Young Towing Company, and Intracoastal Towing & Transportation Company. Each of these companies owned a number of harbor tugs. These three "owning companies" competed with one another in the sense that they solicited their own business, made their own contracts, and invoiced the towed vessels for the service performed. However, the services which were available to the owners and operators of ocean going vessels in the port of Galveston from the three "owning companies" were identical. This comes about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G. & H. Towing Company, an operating Company, which was owned jointly by the three "owning companies". In carrying out the orders for towing service, G. & H. Towing Company would use the tugs which were most readily available and convenient, without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed. The contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner. The contracts offered by the three "owning companies" (their owners or charterers) were identical in terms, and upon a single printed form. The rates too were the same, save for an exclusive contract a ten percent (10%) reduction was allowed. The contract with Maritime Overseas was of this nature, and carried the ten percent (10%) discount.

11. Among the other provisions of this contract, to which reference is made for all purposes, was the following provision, which by reason of its significance is quoted here:

"Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect to all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

12. Captain Emmett Gray, one of the respondents, is full time and salaried employee of G. & H. Towing Company. Prior to March 1, 1958, he had served for several years as night dispatcher for G. & H., and on that date he became Port Captain for G. & H., and was placed in full charge of the dispatching office. Since 1932, he has held an unlimited pilot's license covering Galveston harbor, as well as other adjacent waters. As Port Captain for G. & H., he was the "dead ship" pilot assigned by his employer for all shifting of dead ships within Galveston harbor when the tugs operated by G. & H. were employed. Out of the fixed charge made for shifting a vessel without her power, Captain Gray received a percentage of this charge (in addition to his salary from G. & H.), with the balance of the charge going to the company owning the contract (one of the three "owning companies"), and G. & H. as the operating company. In this regard, it should be noted that Captain Gray's duties with G. & H. did not contemplate, nor did he accept, employment as a harbor or branch pilot (meeting incoming vessels at the sea buoy, and bringing

them, usually under their own power, into Galveston harbor, with converse service for out going vessels.)

13. On the morning of March 21, 1958, Captain Gray boarded the HAR CANAAN as she lay at Pier 15, and assumed the conning of the vessel. He informed her Master of his intention to use the port anchor in turning the ship into Slip A, and the First Mate of the HAR CANAAN, with a deck crew, was stationed in her bow and the anchor made ready for use on orders from the bridge. Thereupon, the HAR CANAAN was moved westerly down the channel toward Slip A, with the Tugs JUNO, ALBATROSS, and J. R. GUYTON, made up alongside and providing the only motive and directional power for the vessel under orders given directly to them by Captain Gray from the bridge of the HAR CANAAN. The Master of the HAR CANAAN was also upon the bridge of his vessel at all times during the maneuver, and he relayed to the First Officer in the bow and the crew orders as received from Captain Gray during the maneuver, including the order to let go the port anchor. The helm of the HAR CANAAN was lashed, as her propelling machinery was shut down, and she had no steerageway of her own.

14. Shortly after noon, as the HAR CANAAN reached the vicinity of Pier 41, she was navigated by the tugs at an angle from the center of the channel toward the opening of Slip A. Captain Gray then ordered the port anchor to be dropped, with one shot of chain, and this order was promptly executed. Subsequently, the bow of the ship, with anchor down, continued to move toward the northeast corner of Slip A and came within about 10 feet of contact with the whirley barge in that position before the anchor was heaved in some five minutes later. Almost immediately after the anchor was dropped, violent move-

ments of the sewer pipe, which was westerly of the two pipes being laid, were perceptible to the workmen on shore as well as to the diver working underwater. Sounds such as would have been caused by the breaking of the pipeline were also heard by the workmen on shore when the anchor of the HAR CANAAN was heaved in. Subsequent investigations did show that the sewer line was badly bent or broken, but still in the trench, at a point approximately 250 feet out in the channel, and was completely broken at a point only 90 feet from the bulkhead, with the ends of the pipe at this point pulled out of the trench and lying in front of the opening to Slip A.

15. Immediately prior to the arrival of the HAR CANAAN at Slip A on the 21st of March, 1958, the water and sewer lines were being constructed by libellants in accordance with the permit duly issued for that purpose, and these two pipelines were properly situated at the depth and in the position prescribed in such permit, as amended December 16, 1957.

16. The port anchor of the HAR CANAAN was dropped on, or dragged over, one, or perhaps both of said lines, on March 21, 1958, breaking the sewer line, the more westerly of the two, and causing damages to each of the libellants in amounts to be determined.

17. Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipelines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible.

18. Captain Gray was not misled by the position of the warning signs, and was negligent in giving the order to drop the anchor without regard to the presence of the pipelines.

19. The tide was nearing the end of the ebb, and the wind was from the southeast at force three, although neither weather, wind nor tide were factors of any consequence in the handling of the HAR CANAAN at the time, and no emergency or necessity required that the anchor be dropped at the place where it was dropped.

20. Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times.

21. The Master of the HAR CANAAN was not negligent in failing to intervene, or displace, the pilot when the order to drop the anchor was issued by Captain Gray, because the situation was not one of obvious danger, and the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master.

22. Neither the Master nor crew of the HAR CANAAN was negligent, or at fault, in any particular.

23. The assisting tugs were properly maneuvered by their crews in accordance with orders given them, and were in no way at fault.

CONCLUSIONS OF LAW

1. Captain Emmett Gray is personally liable for his own acts of negligence.

2. G. & H. Towing Company is liable for the negligence of Captain Gray as its employee.

3. The HAR CANAAN is liable, *in rem*, for the negligence of Captain Gray as her pilot.

4. Libellants are entitled to recover their provable damages, as their interests may appear, from the HAR CANAAN, *in rem*, from G. & H. Towing Company, *in personam*, and from Emmett Gray, individually. The liability so decreed shall be joint and several.

5. Libellants are not entitled to recover from the tugs J. R. GUYTON, JUNO, or ALBATROSS, in rem, or from Bay-Houston Towing Company or Suderman & Young Towing Company, in personam.

The foregoing Conclusions dealing with the liability of the respondents to libellants, in my judgment, follow quite readily from the Findings of Fact set out above, and present no serious question of law.

The libellants obviously were not parties to the contract of towage between Maritime Overseas and Bay-Houston, and the liability of respondents to libellants has been determined without regard to the provisions of such contract.

In considering the question of liability over between the various respondents, however, the validity of the so-called "pilotage" clause (Finding No. 11) is placed in issue.

Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, and the related opinions immediately following. Respondents G. & H. and Captain Gray in supporting the validity of the exculpatory provisions rely primarily on *Sun Oil Co. v. Dalzell Towing Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor, whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an em-

ployee of the towing company, and such towing company did "have power to drive hard bargains."

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power."; and (b) "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Thus, as to the liability over between the several respondents, the following Conclusions are made.

6. G. & H. Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the HAR CANAAN, for any payment they may be required to make under the decree to be entered herein.

7. Maritime Overseas Corporation, as claimant of the HAR CANAAN, is entitled to indemnity from Captain Emmett Gray, individually, and from G. & H. Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G. & H. Towing Company to Maritime Overseas will be joint and several.

The Clerk of the Court will furnish counsel of record a copy hereof.

Counsel will present appropriate order promptly.

Done at Houston, Texas, this 24th day of December, 1959.

BEN C. CONNALLY
United States District Judge

APPENDIX IV.

TUGS:

C. R. HADEN
H. O. WEATHERBEE
J. R. GUYTON
JENNIFER GEORGE

LAURA HADEN
LUCY HADEN
R. T. McDOW
R. J. WALES

W. A. WANSLEY

[redacted] BARBARA GEORGE
J. HARRIS MASTERSON

TUG BOAT HARBOR TARIFF

EFFECTIVE APRIL 10, 1957

BAY-HOUSTON TOWING CO.

GALVESTON

504 National Hotel Bldg.
Phone 5-9381
Pier 10 Wharf Phone: 3-4673

Night Phones: { 3-4673 - 5-7534
5-6542

HOUSTON

811 Cotton Exchange Building
Phone: CApitol 2-6231
Dock Phone: WAlnut 8-5406

Night Phones: { JAckson 4-8635
UNderwood 9-2701

CORPUS CHRISTI

Ore Dock
Phone: TUlip 4-8791 & TUlip 3-7843
Night Phone: 53 Ingleside

Gulf Coast Towing, Harbor Towing, Oil Lightering and Transportation

OIL BARGE IFS 201

CORRESPONDENCE AND WORK SOLICITED

B Tug Calls:_____ **(Long, Short, Long)**

H Tug Calls:_____ **(Long, Short, Long, Short)**

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

ASSISTING VESSELS

GALVESTON — TEXAS CITY

Docking or Off Docking at Galveston: per tug	$ [illegible]
Shifting Docks in Docks: per tug	[illegible]
Off docking and to Bolivar Roads: per tug	[illegible]
Off docking and to Texas City and Docking: per tug	[illegible]
Bolivar Roads to Texas City or vice versa: per tug	[illegible]
Docking, Off Docking, or Shifting at Texas City: per tug	[illegible]
Towing vessels or ocean going barges from Galveston Bay to Bolivar Roads, Texas City or between docks: per tug. Per hour or fractional part	[illegible]
Running time chargeable	
Shifting derrick barges: Galveston Harbor	[illegible]
Galveston to Bolivar Roads	[illegible]
Galveston to Texas City	[illegible]
Dockage: Shifting Vessels Without Own Power	[illegible]

SPECIAL SERVICES

Fueling on ships at wharf:

When tug is engaged in assisting vessel: one half hour free period first visit succeeding hours or fractional part — $ [illegible]

When Tug not engaged in assisting vessel: Per hour or fractional part — [illegible]

Running time chargeable

Furnishing and delivering water to ships at anchorage: Per Trip — [illegible]

IN TOWING VESSELS OR BARGES TOWED VESSELS TO FURNISH HAWSERS

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves wharf, minimum charges of $[illegible] at Galveston and $[illegible] at Texas City will be made.

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $[illegible] per hour with one half hour free time allowed.

HOUSTON SHIP CHANNEL

BETWEEN	
Morgan's Point and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	$[illegible]
Morgan's Point and Baytown	[illegible]
Bolivar Roads and Morgan's Point or Baytown	[illegible]
Bolivar Roads and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	[illegible]
Galveston and Baytown	[illegible]
Texas City and Baytown	[illegible]
Houston and Norsworthy, Crown, Galena or Sinco	[illegible]
Houston and Todd Shipyards, Port Adams, Sheffield, Shell or Ordnance Depot	[illegible]
Galveston and Houston	[illegible]
Bolivar Roads and Houston	[illegible]
Texas City and Houston	[illegible]
Morgan's Point and Houston	[illegible]
Houston and Baytown	[illegible]
Baytown and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	[illegible]

(Norsworthy, Crown, Galena, Sinco, Clinton, Manchester take same rates as Houston from above points.)

Above charges including Docking or Off Docking

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

HOUSTON SHIP CHANNEL
DOCKING AND OFF DOCKING

Docking or off Docking at any point between Manchester Terminal and Turning Basin, both inclusive $
Docking or off Docking at any point below Manchester to Navigation, inclusive
Docking or off Docking at points below Navigation to Galveston Depot, inclusive
Docking or off Docking at Baytown

SHIFTING

Shifting vessels between docks at Manchester Terminal and Turning Basin, both inclusive, per tug $
Shifting vessels between points below Manchester to Navigation, inclusive, per tug
Shifting vessels from one point to another on the same dock between points below Navigation to Galveston Depot, inclusive
Shifting vessels between points below Navigation to Galveston Depot, inclusive, per tug
Shifting from one Berth to another at Baytown

MISCELLANEOUS SERVICES

Pulling on ships account:
When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part
When tug is not engaged in assisting vessel, per hour or fractional part
Running time chargeable
The above rates to apply for a single tug
Tugs ordered to stand by but not put to work will be charged for the same as Docking
Rates for towing dead ships between points on Houston Ship Channel other than above specified will be charged for on pulling time basis
All towed vessels to furnish towing hawsers
Holding vessels off docks and reducing shifting rates to apply
Mooring to or holding vessel in slip or alongside bank waiting for berth during tide rate per hour
When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charge of $60.00 will be made
Furnishing and delivering water to ships: Per Trip

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $ per hour, with one half hour free time allowed

PORT ARANSAS—CORPUS CHRISTI

Docking, off docking or shifting at Harbor Island $
Assisting between Harbor Island and Corpus Christi
Sea to Ingleside
To dock at Ingleside
When tug is at Ingleside
When tug is not at Ingleside
Assisting between Ingleside and Harbor Island
Assisting between Ingleside and Corpus Christi
Sea to Corpus Christi and dock
From outside bridge at Corpus Christi and to dock at Turning Basin, starting
To dock at wharves in Corpus Christi Turning Basin
Shifting in Corpus Christi Turning Basin
Sea to Terminal of the Reynolds Metal Company, Near Ingleside
Docking or undocking at the Terminal of the Reynolds Metal Company, Near Ingleside
From outside bridge to all points between Nueces Docks and Oil Docks, all inclusive
From Turning Basin inside the bridge to above docks
To docking or off docking at above docks
To shifting between above docks, or between above docks and docks in Corpus Christi Turning Basin
Pulling on ships account:
When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part
When tug is not engaged in assisting vessel, per hour or fractional part
Running time chargeable
When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Corpus Christi and Harbor Island and $90.00 at Ingleside will be made
The above rates to apply for a single tug
Detention: One half hour free time thereafter, per hour
Furnishing and delivering water to ships at Harbor Island, Ingleside or Corpus Christi: Per Trip

OVERTIME RATE

20% will be added to the tariff rates for all work performed between the hours of 5 P.M. and 8 A.M. and for work performed on Sundays and Holidays and Mondays following Holidays.
Overtime Rate to apply when service is started and or completed in an overtime hour.
Starting time will be the time Tug leaves berth and time of completion will be the time Tug returns to berth.

FORCE MAJEURE

Neither party shall be responsible for delays, failures or omission hereunder due to strikes, lockouts, labor disturbances, riots, fire, earthquakes, storm, lightning, epidemics, war disorders, acts of God, etc.

The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195__

The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

All charges are net, except when services are performed under contract, then a discount of 10% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By _____

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